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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 512

BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF HERNANDO, STATE OF FLORIDA, A BODY CORPORATE UNDER THE LAWS OF THE STATE OF FLORIDA,

Petitioner,

vs.

W. J. MEREDITH, JAMES G. MARTIN, AND A. R. OHMART.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

O. K. REAVES,
Counsel for Petitioner.

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W. J. MEREDITH, JAMES G. MARTIN, AND A. R. OHMART.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Board of Public Instruction for the County of Hernando, State of Florida, a body corporate under the Laws of the State of Florida, prays that a writ of certiorari issue to review a final judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered on May 15, 1941, and to review a preceding inter-

locutory judgment entered in the same cause on June 25, 1940.*

In support of this petition your petitioner shows:

Summary Statement of Matters Involved.

1. In this case two appeals have been decided by the Circuit Court of Appeals for the Fifth Circuit: The first in Case No. 9461, and the last in Case No. 9803. The first reversed a decision in favor of petitioner and remanded the cause for further proceedings; the last affirmed a judgment entered against petitioner. Both records are before the Court. The first decision did not make a final disposition of the case and is now subject to review by certiorari. It involved and held valid bonds which are identical to other bonds held void by the Florida courts.

In the complaint (declaration under Florida practice then in effect) respondents averred that in accordance with Chapter 10655, Laws of Florida, 1925, petitioner on June 1, 1925, for the purpose of borrowing money with which to buy a site and erect a high school building thereon, had issued, under its seal and signatures of its officers, and sold seventy-five bonds in the sum of $1,000 each; that said bonds had been validated and a certificate of such validation affixed upon each bond, a copy of one of the bonds being exhibited; that attached to them were interest coupons for $30 each, maturing June 1 and December 1 of each year, until the bonds matured thirty years hence, executed with facsimile signatures, and payable to bearer, copy of one being exhibited; that respondents were the owners, for value and without notice, of 715 of such coupons clipped from bonds No. 1 to 25 and from 36 to 75, none of which had been paid (R. 9461, pp. 1 to 9).

* While this volume seems ponderous, the reason largely is the number of lengthy appendices.

Petitioner challenged by both demurrer and answer the validity of the bonds and the statute under which they were issued as violating Sections 8, 9 and 17, Article 12 of the Florida Constitution (R. 9461, pp. 10-15).

A stipulation was filed by counsel bringing forward certain facts not shown by the pleadings but to be considered with them, namely, that prior to passage of the Act, under which the bonds issued, Hernando County, pursuant to law, had been divided into eight special tax school districts, and all the territory of the county was in one or the other of these districts (the importance of which will appear in the argument); that it was necessary if the school were built, that it be built in one or the other of said districts; that the proceedings under which the county had been thus divided were matters of public record in the county; that the school was actually built in Brooksville, District No. 1; that such building had since it was built housed the only high school in the county, and was attended by pupils residing anywhere in the county; that prior to its erection there was in Brooksville, built by District No. 1, a high school building, which housed the only high school in the county, attended by pupils residing anywhere in the county; that transportation had been furnished by the county to both, the expense of which was paid from the school fund (R. 9641, pp. 16-19).

The District Judge held the bonds void, sustained petitioner's demurrer and entered final judgment against respondents (R. 9461, p. 18). They appealed, and the Circuit Court of Appeals held the bonds valid, reversed the judgment and remanded the cause for further proceedings (R. 9461, p. 28).

It is appropriate to observe the setting out of which the question, whether the bonds are valid, arises. Article 12 of the Florida Constitution consisting of seventeen sections provides a comprehensive plan for the establishment and

operation of public free schools in the several counties of the State. We have copied it in full as Appendix "A" to this brief. Section 8 requires each county to assess, for the *support* of the schools, a tax of not less than three nor more than ten mills on all taxable property. Section 9 provides that the tax required under Section 8 and other funds mentioned in Section 9 shall constitute the county school fund, and shall be disbursed by the County Board of Instruction "solely for the support and maintenance of public free schools." Section 10 provides that the Legislature may provide for division of the several counties into convenient school districts and for officers of such districts "who shall have the supervision of all the schools within the district"; and for levying a district school tax for the exclusive use of "public free schools within the district." Section 11 provides that any incorporated city or town may constitute a district and that the tax authorized in Section 10 may be expended in the district where levied "for building or repairing school houses." Section 17 authorizes the Legislature to provide that special tax school districts may issue bonds for the "exclusive use of public free schools in the District." The Legislature provided for the formation of such districts, Section 700, *et seq.*, Compiled General Laws of Florida, 1927, and Hernando County was so divided (stipulation R. 9461, p. 16).

Thus school districts may levy taxes and issue bonds and use the funds to build and repair school buildings. But the county wide tax provided for by Section 8 is required to be disbursed for *support and maintenance* of the schools. The phrase "support and maintenance" means current expense of the schools, and excludes buying new sites and erecting new school buildings.

The Statute (Appendix "B") purports to authorize issuance of the bonds for the purpose of buying a site and erecting a high school building (Section 1) and intercep-

tion of the support and maintenance tax required by Section 8 for payment of such bonds (Section 5). If valid, it will keep the taxes raised by Section 8 for support and maintenance of the schools from going into the school fund as required by Section 9, and require same to be used to pay bonds and interest coupons, thus preventing same from being disbursed for support and maintenance of the schools.

Only a short time before the first decision of the Circuit Court of Appeals, the Supreme Court of Florida passed upon identical bonds under an identical Statute, *State ex rel. Vickery* v. *Mowat,* 193 So. 751, see Appendix "C" for proceedings and Appendix "D" for statute therein. The lower State Court had held the bonds void and this was affirmed by evenly divided court. The Florida Court consisted of six Justices, three of whom said that the contention that the bonds were invalid was sustained by the decisions of that Court, but under the circumstances they were unwilling to hold them void, it not appearing that to pay them would materially interfere with operating the public schools (see opinion, Appendix "C", p. 53). The other three dissented from this view and voted to affirm the judgment of the lower court holding the bonds void.

After remand, petitioner filed further defenses, (1) denying the genuineness of the coupons or that they were clipped from the bonds issued by it, and (2) alleging that if the taxes were diverted to the payment of the bonds and interest coupons, it would prevent the operation of the schools (R. 9803, pp. 11, 12). On motion of respondents for summary judgment (R. 9803, p. 17) the District Court, holding there was no genuine issue as to any material fact, entered final judgment against petitioner, payable from the tax required by Section 8, Florida Constitution (R. 9803, p. 22). Petitioner appealed (R. 9803, p. 26), but the judgment was affirmed by the Circuit Court of Appeals on May 15, 1941 (R. 9803, p. 39).

Questions Presented.

1. It appearing that, in the *Mowat* case just above mentioned, a Circuit Court in Florida had held identical bonds invalid and that the Supreme Court of Florida had affirmed the judgment by an evenly divided court, whose personnel had not changed, and there being no evidence that any member of the said Court had changed his views on the question, should not the Circuit Court of Appeals have affirmed the judgment of the District Court holding the bonds invalid? There are two reasons why it should have: First, it would have produced the same results in the State and Federal court; second, the judgment of the State Circuit Court, evenly affirmed, was a binding source of State law, absent a Supreme Court decision, *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 176, and absent evidence that the law of the State is otherwise. *Six Companies* v. *Joint Highway Dist. No. 13*, 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed. 159.

2. Are not the bonds void under the Florida decisions, and was not the Circuit Court of Appeals required to affirm the District Court judgment holding them invalid? Any right of the bondholders to assert a claim or lien against the school building is not involved. The question of validity of the bonds is clearly drawn by comparison of the statute with applicable constitutional provisions.

The Constitution, Sections 8 and 9, Article 12, require each county to levy a tax and require the proceeds thereof to be disbursed for the "support and maintenance" of its public free schools. The statute purporting to authorize the bonds here involved prescribes that these tax funds shall be used for another purpose, namely, to pay bonds, and interest on them, issued to build a school building—not support and maintenance at all. For discussion and authorities see point two of brief.

3. When a genuine factual issue was presented by the answer of petitioner—namely, the genuineness of the coupons—was it proper on motion for summary judgment, under Rule 56, to receive an affidavit to meet the issue tendered and enter judgment thereon against petitioner, there being no claim that such factual issue was not tendered in good faith, and there being no counter-affidavit tendered by petitioner.

This is an important question of procedure under the New Federal Rules and has direct bearing upon whether the fundamental rights of trial and cross-examination are to be preserved.

Opinions of Lower Court.

The District Court filed no opinion in either case. The first opinion of the Circuit Court of Appeals (*Meredith* v. *Board,* 112 F. (2d) 914) was filed June 25, 1940 (R. 9461, p. 24); the second (*Board* v. *Meredith,* 119 F. (2d) 712) was filed May 15, 1941 (R. 9803, p. 36). Judgment of affirmance was entered in the last appeal on May 15, 1941 (R. 9803, p. 39).

In its first opinion the Circuit Court of Appeals held that it was bound by the Florida Supreme Court decisions, but that the exact question presented had not been decided by that court; hence that it would apply the law as it understood it. It referred to *State ex rel. Vickery* v. *Mowat,* 193 So. (Fla.) 751, where the validity of bonds issued under identical statute was passed on by the Florida court, and said that case did not settle the question because the Florida court was composed of six Justices, evenly divided. By the proceedings in that case (Appendix "C") it clearly appears that the opinion of all six Justices was that the bonds were invalid, but three of them thought that regardless of the invalidity of the bonds the board should not be permitted to defend against them, absent a showing that

to pay them would interfere with operating the schools, while the other three voted to affirm the lower court judgment holding them void.

The court then referred to *Warren* v. *Board of Public Instruction,* 97 So. 384, decided many years ago, in which no opinion was written by the Florida court, and held that it decided the broad issue presented, because it was said that in the *Warren* case the Florida court held valid a bond issue by a similar body for the purpose of building an addition to a then existing county high school building, and furnishing it, which were capital expenditures, and that the distinction between building an enlargement to an existing building and erecting a new one was negligible. The Florida court has several times in later opinions referred to the *Warren* case, interpreting it contrary to the interpretation placed on it by the court. It also held that the absence of power to issue bonds for the stated purposes was an implied constitutional limitation established by the Florida court, if at all, after the bonds before it were issued, and that under the circumstances it required more than an implied constitutional exclusion to justify it in holding the bonds invalid.

On the second appeal the court said it had already upheld the bonds as valid and nothing remained to be shown except that the coupons were actually clipped from the genuine bonds, denied by petitioner, and that even though the coupons bore no signatures which would enable petitioner to identify them as its obligation, it was in keeping with the letter and spirit of Rule 56 that such issue could be met and decided upon *ex parte* affidavits, if not offset by opposing affidavits.

In a previous decision, *City of Hialeah* v. *Groves,* 101 F. (2d) 951, the court had held, under the Florida law, that when the City denied that the coupons sued on were executed by it or were detached from bonds executed by it,

the plaintiff must prove they were, and it was error to enter judgment without proof. Under the last decision in the present litigation the court held that affidavits may be used as such proof.

Jurisdiction.

The final judgment of the Circuit Court of Appeals now sought to be reviewed was entered May 15, 1941 (R. 9803, p. 39). The previous interlocutory decision of the Circuit Court of Appeals was rendered on June 25, 1940 (R. 9461, p. 28). This decision is subject to review on certiorari after final judgment was entered, *Hamilton-Brown Shoe Company* v. *Wolf Brothers & Co.*, 240 U. S. 251, 36 S. Ct. 269, 60 L. Ed. 629.

Jurisdiction of this Court to review on certiorari exists under Section 240(a), Judicial Code; Section 347, Title 28, U. S. Code Annotated.

Reasons Relied Upon for Writ.

1. The Circuit Court of Appeals disregarded binding sources of State law, and its decision produces the anomalous result that the bonds are valid in the Federal Court, and void in the State Court, contrary to the mandates of this Court in *Erie R. Co.* v. *Tompkins,* and subsequent cases.

2. The decision by the Circuit Court of Appeals that funds appropriated by the constitution law to the support and maintenance of public schools may be impaired and invaded by statute for the purpose of buying sites and building schools is in conflict with the law of Florida, as well as with the great weight of authority upon the question.

3. The decision of the Circuit Court of Appeals on the last appeal that *ex parte* affidavits may be submitted as

proof of material facts on motion for summary judgment is untenable, is in conflict with the letter and spirit of Rule 56, Civil Rules of Procedure, and is in conflict with the case law so far decided interpreting said rule. The ultimate effect of such holding is to invade the right of trial and of cross-examination.

WHEREFORE, your petitioner prays that writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court as authorized by the Statutes of the United States, and that the judgments herein of the Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated at Tampa, Florida, this the 31 day of July, A. D. 1941.

O. K. REAVES,
Attorney for Petitioner,
Tampa, Fla.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

Please refer to the petition under this heading for full statement of the opinions of the lower courts.

Jurisdiction.

Please refer to the petition under this heading for statement of the basis of jurisdiction of this Court.

Assignments of Error.

1. The Circuit Court of Appeals erred in reversing the first judgment when it appeared certain that if the same judgment were before the Supreme Court of Florida it would be affirmed.

2. The Circuit Court of Appeals erred in its first judgment reversing the judgment in favor of petitioner and holding that the coupons sued on by respondents were valid obligations of petitioner, said judgment being contrary to Florida law.

3. The Circuit Court of Appeals erred in holding that respondents could meet the burden of proving that the coupons in question were clipped from bonds executed by petitioner, and that they were genuine interest coupons issued by petitioner, by submitting the *ex parte* affidavit of a non-resident in which he said he clipped such coupons from bonds issued by petitioner.

Statement of Case.

Please refer to the heading, "Summary Statement of Matters Involved", in the petition, for a full statement of the case.

Summary of Argument.

POINT ONE:

The Circuit Court of Appeals erred in reversing the judgment of the lower court which held the bonds void, it ap-

pearing that the Supreme Court of Florida would have affirmed the same judgment, as it had affirmed a similar judgment holding identical bonds void. See *State ex rel. Vickery* v. *Mowat,* 193 So. 751, and appendix "C" for proceedings, and appendix "D" for statute, in that case. Appendix C page 53 is unreported opinion filed in the cause showing the question was the same as in the case at bar and that the lower court held the bonds void. The report (193 So. 751) shows the lower court was affirmed by an evenly divided court.

Assuming the question of validity of the bonds is evenly balanced in the views of the six Florida Justices, the most favorable view for opponents, then the views shown to have prevailed in the lower State courts, and in the lower Federal courts which, in matters of State law, really perform the functions of State courts, ought to prevail in the Circuit Court of Appeals. This must be the rule or confusion will exist. Moreover a "state is not without law save as its highest court has declared it. There are many rules of decision accepted and acted upon by the bar and inferior courts," which the Circuit Court of Appeals was "not free to reject", merely because they have not received the sanction of the highest Florida Court, even though it thinks such State rule as applied by the lower courts unsound or that another is preferable. *West* v. *American Telephone & Telegraph Co.,* 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 146; *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 176; particularly where, as here, there is no "convincing evidence that the law of the state is otherwise" than as applied in the lower courts. *Six Companies* v. *Joint Highway Dist. No. 13,* 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed. 159.

A judgment of a Circuit Court in Florida is presumed right in fact and law. *City of South Miami* v. *Landis,* 192

So. 624. And whoever challenges it on appeal has the burden of showing it is wrong. *Brooks* v. *Pryor*, 189 So. 675. Hence the judgment of the lower court in *State ex rel. Vickery* v. *Mowat*, 193 So. 751, holding similar bonds void is presumed correct, and that presumption cannot be overturned on an affirmance by an evenly divided court. The Circuit Court of Appeals should have indulged the presumption it was right. The function of that court is to correct misapplication of State law, but in this case it has itself misapplied State law, as established by lower court decisions which carry every presumption of correctness.

POINT TWO:

If it cannot be said that the Circuit Court of Appeals was bound by the established lower court rulings upon the question at bar, it erroneously misapplied the law upon this most important question, as evidenced by Florida Supreme Court decisions.

In the *Mowat* case, 193 So. 751, appendix "C", page 53, the three Justices who wanted to reverse the lower court stated that the invalidity of the bonds was supported by decisions of the Florida Court, and that they did not recede from that view, but for other reasons, it not appearing that to pay the bonds would materially interfere with the operation of the schools, they would not hold them void. The other three Justices dissented from the opinion prepared and voted to affirm the lower court which held them void. Thus three Justices hold unqualifiedly the bonds are void, while the other three say for all practical purposes they are void under previous decisions of the court. Had the Circuit Court of Appeals tried to find and follow the law of Florida, rather than make a decision it thought right, it need not have gone further than this case.

The Florida Court has consistently held that Boards of Public Instruction cannot issue bonds or notes payable in

future years out of the tax funds required to be raised by Section 8, Article 12, in order to raise money for current expenses of operating the schools, *Barrow* v. *Moffett*, 116 So. 71, or to equip school buildings, *Board* v. *Union School Furnishing Co.*, 129 So. 824, or to buy sites and erect school buildings in school districts, *Leonard* v. *Franklin*, 93 So. 688.

The building of schools is provided for under Sections 10, 11 and 17 of Article 12, and the school fund provided for in Sections 8 and 9 are pledged by the Constitution to operating existing schools. *State* v. *Board*, 170 So. 602. This was so stated and recognized by the Circuit Court of Appeals in a recent case from Florida. *Board* v. *Osburn*, 101 F. (2d) 919.

Where, however, deficits arise due to current operating expenses, including necessary repairs and furnishings, exceeding anticipated revenues, they constitute obligations of the board and when authorized by statute may be refunded by issuance of bonds, it not appearing budgetary requirements will be upset. *State* v. *Board*, 170 So. 602; *Board* v. *Osburn*, 5 Cir., 101 F. (2d) 919.

Bonds and other obligations issued contrary to the Constitution are void. *State ex rel. Vickery* v. *Mowat*, 193 So. 751; *Board* v. *Union School Furnishing Co.*, 129 So. 824; *State* v. *Greer*, 102 So. 739, and they are not made valid as to innocent purchasers by a validating decree. *State ex rel. Vickery* v. *Mowat, supra; State* v. *Town of Belleair*, 170 So. 434. Especially where they are on their face in conflict with statutory or constitutional powers. *Olds* v. *Alvord*, 191 So. 434, text 443; *Weinberger* v. *Board*, 112 So. 253.

POINT THREE:

Where it is alleged, in a suit against a public body, that interest coupons sued on were issued by and were clipped from bonds issued by that body, and such allegation is denied, there was a material issue. *City of Hialeah* v.

Groves, 5 Cir., 101 F. (2d) 951. And where it appears in said suit that such clipped coupons bore no signatures, except printed or lithographed ones, or other means of identifying them, and the defendant had sworn to such facts in response to a notice to admit their genuineness, the issue tendered as to the authenticity of the coupons was a genuine issue, and not a mere colorable or formal issue. If there is a genuine want of knowledge necessary to enable defendant to admit authenticity of the coupons, there was a genuine issue. *United States* v. *Gotham Pharmacal Co.*, 4 Fed. Rules Service 56, f. 21-1.

Under such circumstances it was a deprivation of defendant's rights of trial and cross examination for the court to enter summary judgment against defendant, without proof by plaintiff other than an *ex parte* affidavit, the burden of proving the authenticity of the coupons being on plaintiffs. The rule is not designed to provide a summary trial, but only to determine if there is a real issue to try. *Merchants Ind. Corp.* v. *Peterson*, 3 Cir., 113 F. (2d) 4; *Wynant* v. *Crittenden*, U. S. C. A., D. C., 113 F. (2d) 170. And certainly affidavits are not admissible to prove issues if they are genuine. See *Moore's Federal Practice*, Vol. 3, p. 3174, 3184, and authorities there cited.

ARGUMENT.

Point One: The Circuit Court of Appeals erred in reversing the judgment, it appearing it would have been affirmed by the Supreme Court of Florida, at least by an evenly divided court.

By the first assignment of error this question is raised: What should the Circuit Court of Appeals have done with a judgment which, if it had been rendered by a State Circuit Court and appealed to the State Supreme Court, would have certainly been affirmed, at least by an evenly divided court?

The Florida Supreme Court, when it decided *State ex rel. Vickery* v. *Mowat,* 193 So. 751, passed upon the validity of bonds identical to these at bar (see appendix "C" for proceedings and unreported opinion in that case, and appendix "D" for statute under which the bonds were issued). It was composed by law of six Justices, all of whom participated. The Circuit Court of Appeals admitted (112 F. (2d) 916) the *Mowat* case involved the same questions but held it was not bound because the judgment of the lower court holding the bonds void was affirmed by an evenly divided court. Three Justices, while stating that the contention that the bonds were void was supported by Florida decisions cited, voted to reverse the judgment, while the other three voted to affirm the judgment of the Circuit Court holding the bonds void.

We think that previous decisions of the Florida court establish that the bonds are void, that the reasons which the three Justices gave for voting to reverse the judgment are clearly contrary to apposite Florida decisions, hereinafter to be discussed, and that the bonds are in fact, under the Florida law, void, as the Circuit Court had held, and as half of the Supreme Court held, resulting in affirmance of the Circuit Court. But we shall save that question for argument under the next point, and address the question posed above. In the interest of uniformity between the Federal and State Courts, it would seem that when it appeared to the Circuit Court of Appeals that if the judgment then before it were before the Supreme Court of Florida, it would be affirmed, then the Circuit Court of Appeals ought to have affirmed it, whether or not it agreed with the law as applied by the lower State court.

When the case was before the Circuit Court of Appeals for decision on the validity of the bonds, the personnel of the Supreme Court had not changed since the decision in *Vickery* v. *Mowat,* and there was no reason to suppose or

believe that the attitude of the same six Judges on the Supreme Court had changed from what it was in the *Mowat* case. In such circumstances, was not the State Circuit Court judgment, in the *Mowat* case, entitled to great weight, and was not the judgment of the District Court of the United States, rendered by a Florida Judge sitting in Florida, entitled to great weight, as evidencing the law of Florida? The Circuit Courts of the State of Florida are next in rank to the Supreme Court, there being no intervening appellate court. Their judgments are presumed to be right, both in point of law and fact. *City of South Miami* v. *Landis,* 192 So. 624. In Florida, whoever appeals from a decree or judgment of the Circuit Court has the burden of showing the judgment was wrong, else it will be affirmed. *Brooks* v. *Pryor,* 189 So. 675. Where a case turns upon State law, the only object of the Circuit Court of Appeals is to correct misapplication, or erroneous application, of State law. It was not shown, and in view of the *Mowat* case it could not have been shown, that the district court in holding the bonds void misapplied the law of Florida. When a question has not been settled by the Supreme Court then a decision by a lower court is presumptively correct and ought to be accorded due weight. As this Court has said:

> "A state is not without law, save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable."
>
> *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 146.

The question here involved is of great importance in the proper administration of justice in Florida. It deals with and directly affects one of the most important functions of State government—namely, the operations, maintenance, and support of public free schools. Its solution can have a tremendous effect upon these functions of government.

It is "inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship. In the absence of any contrary showing," the law as adopted and applied in the lower courts of the State, should be the law in the Federal Courts and the Circuit Court of Appeals was not authorized to disregard this source of State law. *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 176.

It so happens that since the Circuit Court of Appeals passed upon the validity of the bonds here involved, a constitutional amendment has been adopted in Florida, adding a seventh Justice to the Florida Supreme Court (see appendix "F"). An authoritative decision of the question in hand may now be had by that court, which would be binding upon the lower State courts and the Federal courts as well. Such decision would establish the law on this important question. Perhaps an appropriate disposition of the case would be to reverse the judgment of the Circuit Court of Appeals, with instructions for that court to affirm the judgment of Judge Akerman, but without prejudice to the right of respondents to sue in the State Court upon these coupons, and there obtain a settlement of the aggravated question. This course was directed by this Court in *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478, 60 S. Ct. 628, an opinion rendered by Mr. Justice Black. Such course would have two advantages: First, it would save the spectacle of having one rule applied in the Federal

Courts and another in the State Courts, while, second, it would allow respondent bondholders every opportunity of securing first-hand application of the State law to their controversy. To do this would not be to deprive the Federal Courts of their power to adjudicate controversies under the State law. It would not be to say to a litigant that the State Supreme Court can not decide your controversy and neither can we. It would be to say in the case at bar that the law of the State was so balanced that the Supreme Court, consisting of an even number of Judges could not decide the question, but now that same court consists of seven Judges, and they cannot evenly divide on the question, but are bound to reach an opinion that would settle the question for all courts, therefore, neither litigant will be foreclosed in a Federal Court in circumstances where, at any time, the Supreme Court of the State may have occasion to settle the question contrary to the way in which it was ruled in the Federal Courts.

Point Two: The Circuit Court of Appeals erred in holding the coupons valid notwithstanding the Florida law to the contrary.

This point is raised by assignment of error No. 2. As an abstract proposition this Court is perhaps not concerned with what the Florida law is. If, however, the doctrine of the now famous *Erie Railroad* case (304 U. S. 64, 58 S. Ct. 817), and subsequent cases, is to mean anything, then it is necessary that the Circuit Court of Appeals ascertain and follow the State law, whatever it is. In respect to the question in hand the State law is not a mere formula of words, into which a case must exactly fit in order for the Federal Courts to be bound. We are dealing with a State Constitution having a spirit, a meaning, and a background, which looks in the direction of, and has for its purpose,

the maintenance and operation of public free schools in the State, a most important function of State government.

The Circuit Court of Appeals has on it no Florida Judge, and it may be difficult for it to place itself in the setting projected from these organic provisions. For this reason, perhaps, "This court looks to the trial court for the original examination of local questions and relies for aid upon the explanation of its conclusion." *City of Texarkana* v. *Arkansas Louisiana Gas Co.*, 306 U. S. 188, 59 S. Ct. 448. Under the decisions of this Court, following the *Erie Railroad* case, it was obligatory upon the Circuit Court of Appeals to "ascertain from all the available data what the State law is," and what decision, if the case in hand were before the Florida Court, would be made, and then to make such decision, regardless of whether it thought the Florida law right. *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 146. Absent a decision by the highest court of the State, the opinion of the Chancery Court, Circuit Court in Florida, is a binding source of State law. *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 176.

All Available Data and Evidence of State Law Point to Invalidity of Bonds.

The Supreme Court of Florida in *State, ex rel. Vickery* v. *Mowat*, 193 So. 751, as already mentioned, had before it the identical question here presented. The Circuit Court had held the bonds void and on appeal the Supreme Court affirmed by an evenly divided Court. In an opinion written by Mr. Justice Terrell (appendix "C", page 53), filed in the case but not reported, since the Justices evenly divided on it, it is said: "The sole question raised in the court below and brought here for determination is the power of the Legislature to authorize the use of the funds raised under Section 8 of Article 12 of the Constitution to pay in-

terest on and retire bonds so issued." It is then said: "It is contended by appellee that the judgment below should be affirmed because all school funds raised under Section 8 of Article 12 must be used for the support and maintenance of the public schools of the county and that no part of it can be used for the construction of buildings. This *contention is supported by the decisions of this court.*" (Italics ours.)

But Mr. Justice Terrell thought that the bonds having been so long issued, and it not appearing that payment of them would affect the operation of the schools the court should not declare them void at the instance of the Board, though "If payment * * * tended to disrupt the school term, we might be forced to hold them invalid." Two Justices agreed with him while three voted to affirm the lower court, as a result of which the lower court's judgment holding the bonds invalid was affirmed (193 So. 751).

It is contended that this case in and of itself is the strongest of evidence of what the law of Florida is on the question. To all intents and purposes it labels them "void". The lower court held them so. Half of the Supreme Court voted to affirm that holding. The other half said the contention that the holding should be affirmed was "supported by the decisions of this Court." United States District Judge Akerman, a Florida Judge, held the bonds at bar invalid. A showing that payment of the bonds would tend to disrupt the operation of the schools, a fact alleged in petitioner's ninth defense (R. 9803, p. 12), would undoubtedly have impelled Judge Terrell and the two Judges who concurred with him to hold them void.

It is illogical to determine the validity of the bonds by the subsequent state of the school treasury. They might be void now, valid next year, and void the year after that. It is not claimed there is any support for such principle as this in Florida law or any other law. On the other hand,

the decisions of Florida are such that if bonds are issued contrary to the Constitution, they are void, and cannot be validated. *Weinberger* v. *Board,* 112 So. 253. In *State* v. *Greer,* 102 So. 739, the Florida Court held bonds issued by the City of Quincy to build school buildings, which the City was not empowered to do, were void, "even in the hands of innocent purchasers," were not improved by validating statute, and the City was not estopped to assert their invalidity though it had got the money, built a school, and paid interest on the bonds for seven years.

In *State* v. *Town of Belleair,* 170 So. 434, the Florida Court held that bonds having issued "without legal authority, there can be no such person as a bona fide holder without notice." And in *Olds* v. *Alvord,* 191 So. 434, Text 443, the court held the bonds void in the hands of those claiming to be innocent purchasers, saying: "The issuing authority being without power to issue bonds, a judicial validating decree could not confer validity." In that case the bonds had been issued in 1924, they were first attacked in 1936 when the city was attempting to refund them (170 So. 434).

In *Board of Public Instruction of Lafayette County* v. *Union School Furnishings Co.,* 129 So. 824, the Florida Court held notes given by the Board of Public Instruction for school equipment, current expenses, were void, and not improved by direct legislative validating act, because the "obligations were assumed and executed in violation of organic law," saying:

> "(4) The framers of the Constitution protected the school fund in so far as it was reasonably possible to do so, and when contractors and vendors deal with a board of public instruction they know, or should know, that the authority of the board is limited and that it is not authorized to pledge its expected revenues for future years for the payment of current obligations. Therefore, when such contractors or vendors deliberately enter into a contract or agreement by

> which the future revenues of the board are attempted to be pledged for the payment of current expenses, they do so at their peril, and they know, or should know, that they have neither moral nor legal right to expect such obligations to be paid from funds to be raised in the future, which funds are provided for the current maintenance of the public free schools and for the benefit of and for the use of those who are entitled to receive the benefits of the school during the annual period for the maintenance of which the fund is collected."

In the light of the decisions already discussed, and the numerous ones later to be referred to, there is no doubt that the lower courts of Florida are bound to hold as an original proposition that these or similar bonds are void. Whether the court should withhold judgment of invalidity is settled in apposite cases, above mentioned. A lower court would have to go in the teeth of these convincing decisions to agree with Judge Terrell, which cannot be expected. If, therefore, it be said there is no controlling decision by the Supreme Court of Florida requiring the Circuit Court of Appeals to affirm Judge Akerman, it may be said that the overwhelming evidence of State law is on the side of Judge Akerman and against the decision made by the Circuit Court of Appeals. There is no balanced doubt of this, and this evidence should control. *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 176. *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 146.

The Circuit Court of Appeals found it unnecessary to discuss Florida decisions specifically touching the question, preferring to stand on a memorandum opinion which did not even disclose what the case was about (*Warren* v. *Board of Public Instruction*, 97 So. 384) and an asserted policy of fidelity to the sanctity of contract in the absence of clear law to the contrary (112 F. (2d) 914), citing authority not even remotely in point with the case in hand. It is fairly

clear that the Circuit Court of Appeals thought itself free to decide the case as it wished. The result is that by accident of Federal jurisdiction the bonds are valid in the Federal Court, void in the State Court.

Background and Spirit of Article 12 Constitution of Florida.

The Florida Court has held the consistent view that the County Boards of Public Instruction may not issue bonds payable in future years against the taxes provided in Sections 8 and 9, for the purpose of raising revenue with which to pay current expenses of operating the schools, *Barrow* v. *Moffett*, 116 So. 71, or to equip buildings, *Board* v. *Union School Furnishing Co.*, 129 So. 824, or to pay salaries of teachers and other expenses of operation, *State* v. *Board*, 98 Fla. 1152, 125 So. 357, or to buy sites and build buildings in school districts. *Leonard* v. *Franklin*, 84 Fla. 402, 93 So. 688.

These provisions of the Constitution contemplate an annual budget of county school expenditures and the "whole policy of our public school system is that the operation of such schools is to be based upon each year's requirements and facilities." *Williams* v. *Board*, 182 So. 837. The Constitution expressly commands that the county school fund provided by Sections 8 and 9, shall be disbursed solely for the maintenance and support of public free schools and clearly does "not contemplate that a large portion of such annual tax shall be pledged or used to liquidate long-term interest bearing warrants to be sold and the proceeds used to aid in the building and equipment of high school buildings in special tax school districts in the county, when Section 10 authorizes a special district tax to be used under Section 11 for building or repairing school houses" in the district. *Leonard* v. *Franklin*, 93 So. 688.

Of course, if at the end of the school year the costs of operating have exceeded the anticipated revenues for that year so that there remains unpaid salaries, or other unpaid items, this is an obligation which must be paid and for which the Board may be sued. *Board* v. *Kennedy*, 147 So. 250, and the accumulation of such deficits may be refunded when authorized by statute, it not being shown that the bonds would violate budgetary requirements or materially disrupt the operation of the schools, *State* v. *Board*, 170 So. 602; *Board* v. *Osburn*, 5 Cir., 101 F. (2d) 919.

The Fifth Circuit Court of Appeals has not always seen eye to eye with the Florida Court in its construction of the school law. See *Board* v. *Gillespie*, 5 Cir., 81 F. (2d) 586, where that court said the decisions of the Florida Court in reference to want of power of the Boards to issue bonds had the effect of writing an implied prohibition into the Constitution which it confessed its inability to find (text 589), and its unwillingness to follow. The Florida Court took note of this in *State* v. *Board*, 170 So. 602, saying:

> "We do not take issue with this pronouncement of our brethren from the Federal bench except to state that a more accurate knowledge of the history and purpose of Article 12 would doubtless have led them to a different conclusion."

The court then goes on to give the background of Article 12 (170 So., text 605), pointing out that it was adopted in 1885 when Florida had little more than quarter of a million people, no towns with as many as ten thousand, and schools in towns were built by private subscription while in the country some patron would donate the lot, the Board would furnish the material and the patrons would meet and "raise" the school house; that when "adopted, Article 12 provided only for present needs, which were primarily current expenses," and that future needs were left to be provided for by amendment, and at least seven amendments

had been added for that purpose; that when adopted, Sections 4, 6, 8 and 9 created and provided for the distribution and use of a general county school fund, while Sections 10 and 11 provided for districts and for taxation by them, which were authorized to be used in "building and repairing school houses" and other school purposes; that in 1912, demands for facilities having increased so greatly, Section 17 was added which, when implemented by legislation prepared by the writer of that opinion, made further provision for taxation by districts for acquiring, building, enlarging "school buildings" and other school purposes; that the consistent practice had been to use the county school fund for current maintenance purposes, the special school district fund raised by Section 10 for maintenance, building repair, etc., and the fund raised by Section 17 for interest and retirement on bonds for building, furnishing or otherwise permanently improving school buildings; that it would be competent for the Legislature to direct the use and appropriation of the county school fund, so long as done "solely for the support and maintenance of public free schools," but the Legislature "is without power to appropriate general county funds for school purposes or to appropriate county school funds for buildings in special tax school districts."

The last quotation above is preclusive of the question of validity of the bonds at bar, because by stipulation (R. 9461, p. 16) it is agreed that the school house was built in a special tax school district, couldn't have been built in the county without being in one or another of its districts, because all territory in the county was in one or another, and the proceedings creating the districts were matters of public record in the county.

Judge Terrell wrote the opinion of the court in the case, *State* v. *Board*, 170 So. 602, just discussed, which covers the field of school financing, and reviews and reconciles previous

decisions. He prepared an opinion in the case of *State ex rel. Vickery* v. *Mowat* (Appendix "C", p. 53), 193 So. 751, in which he and two judges (concurring with him) readily conceded that the contention that the bonds, identical with these at bar, were void was supported by *State* v. *Board*, 170 So. 602, while the other three judges unqualifiedly held them void.

The Fifth Circuit Court in *Board* v. *Osburn*, 101 F. (2d) 919, passing on bonds issued by the Board to refund deficits, and in marking out the fields in which bonds might or might not be issued under the provisions of the Florida Constitution, as interpreted by the Florida courts, had no trouble then understanding the law. It said:

> "In the opinion of the Supreme Court of Florida these provisions (referring to Sections 8 and 9 of Article 12) contemplate an annual budget, to be used only for current expenses, and not to be pledged in future years to the payment of bonds and the interest on them, nor encroached on presently to build houses or obtain permanent equipment for which other sections of the Constitution make special provision."

PRINCIPLES ENUNCIATED BY FLORIDA COURT SAFEGUARDING SCHOOL FUND.

The school funds under our Constitution "are to be regarded as a sacred trust; and the provisions of law safeguarding expenditures from such funds must be strictly construed." *McKinnon* v. *State*, 70 So. 557. And the fund raised by taxation under Section 8, Article 12, must be used solely for the support of the schools. It is "a special fund set apart for a specific purpose, expressly limited by the words maintenance and support of public schools." *Clifton* v. *State*, 79 So. 707.

The Constitution contemplates an annual budget of county school expenditures, and "does not contemplate that interest bearing time warrants or bonds shall be issued and

sold to raise county school funds for the support and maintenance of public free schools. *State* v. *Board*, 125 So. 357. Nor to aid in building school houses in special school districts. *Leonard* v. *Franklin*, 93 So. 688. The object is to keep this fund free of pledges so that it may be available for "present needs". *State* v. *Board*, 170 So. 602; *State* v. *Board*, 125 So. 357.

The payment of teachers' salaries "should be deemed the first duty of boards of education and these should be paid in preference to any other claims against the funds raised and appropriated for maintenance of public free schools." *State* v. *Hobbs*, 158 So. 434. Sections 10, 11, and 17 make ample provision for building school houses. *State* v. *Board*, 170 So. 602. The whole policy of our public school system is that operation of the schools is to be based "upon each year's requirements and facilities", and a bus driver's contract to run over a period of three years is invalid. *Williams* v. *Board*, 182 So. 837.

Purchasers of obligations issued by Boards of Public Instruction "know, or should know, that the authority of the Board is limited", *Board* v. *Union School Furnishing Co.*, 129 So. 824. Those who take notes and obligations of the Board do so "at their peril", because "The first duty of the Board of Public Instruction was to operate the schools of the county during the involved year." *Sholtz* v. *Board*, 174 So. 226.

Neither a county, *State* v. *L'Engle*, 24 So. 539, nor a city, *Munroe* v. *Reeves*, 71 So. 922, has power under the Florida Constitution to issue bonds for the purpose of erecting school houses.

Meaning of "Support" and "Support and Maintenance", in Relation to School Funds.

The interpretation by the Florida Court of the phrase "support and maintenance" of the free schools and the

limitation of the taxes raised for this purpose under Sections 8 and 9 to current operating expenses, excluding the buying of sites and erecting school buildings, is reinforced by a well-nigh unanimous line of decisions from other States. Sec. 60 C. J., page 1173, where the word "support" is defined as follows:

> "(No. 5) D. Used in respect of schools 'support' has reference to their maintenance."

The building of a new school house and the purchase of sites do not come within * * * any well-defined acceptation of "support of the common schools." Both the terms "support" and "current expenses" mean continuing regular expense when applied to public schools. *Sheldon* v. *Purdy* (Wash.), 49 Pac. 228. When congress declared in the admission act that the interest or income on the public school fund could only be expended in the "support" of the schools, it was not intended that any portion of it should be used in the erection or equipment of buildings, "but only for current expenses—the support and maintenance of the school for ordinary, annual expense." Otherwise such grants might be exhausted in the erection of magnificent buildings rather than in the education of the children. *Roach* v. *Gooding* (Idaho), 81 Pac. 642. The language of the Idaho court regarding the erection of magnificent buildings at the cost of educating the children was an accurate forecast of what will happen in Hernando County if the bonds are valid. See ninth defense (R. 9803, p. 12). In *State* v. *McMillan* (N. Dak.), 96 N. W. 310, the court struck down bonds in circumstances like those in the case at bar. Other cases directly in point: *Mitchell* v. *Colgan* (Calif.), 54 Pac. 905; *Love* v. *Rockwell Independent School District* (Tex.), 194 S. W. 659; *Crabb* v. *Board of Trustees* (Ky.), 116 S. W. 706; *Lee* v. *School Trustees*, 36 N. J. Equity 581; *Riesen* v. *School District, No. 4* (Minn.), 212 N. W. 783;

Horn v. *Paragould Special School District No. 1* (Ark.), 57 S. W. (2d) 568.

In Florida the word "support" was at an early date defined as follows: "to support means 'to sustain, to supply funds for the means of continuing, as to support the expenses of Government.'" Opinion to the Governor, 13 Fla. 688.

In Florida "support and maintenance" in relation to schools refers to current expenses, *State ex rel. Vickery* v. *Mowat*, 193 So. 751 (appendix "C"): *State* v. *Board*, 170 So. 602; *Board* v. *Osburn*, 5 Cir., 101 F. (2d) 919. This, of course, does not mean that repairs and furnishings necessary to current use may not be paid, or that that part of present repairs or extensions, which will be serviceable in future years may not be charged to the fund for such years. *Whitmore* v. *Brown* (Cal.), 279 Pac. 447, text 451, where the court said:

> "The conclusions we have thus arrived at are not intended, however, to be given such a narrowness of application as to wholly forbid the application of school moneys derived from taxation to such uses as that of making those ordinary repairs in existing school structures as are required for their adequate use during the current year, or as are by such use made necessary for like uses in the succeeding year; nor to emergency provision of such structures, temporary in character as the immediate needs of the department require during any particular period. But the erection of such permanent buildings as are contemplated by this tax cannot be brought by any rational interpretation within the otherwise limited meaning of the word 'support.'"

See also text page 604 of 170 Southern, where the Florida court explained *Warren* v. *Board of Public Instruction*, 97 So. 384, relied upon by the Circuit Court of Appeals for its decision, as being of this class. A copy of the act under

which the bonds in the *Warren* case were issued is attached hereto as appendix "E", from which it clearly appears that an enlargement of an existing building was authorized, that the fund from which they were to be paid was limited to not more than one half mill on the taxable property of the county, which was to be provided from the county school fund. The bonds in question are not limited to any specified part of the school fund, and they were issued to buy a site and erect a new building. This fact is recited upon their face (R. 9803, p. 8), and whoever bought them was charged with notice of such fact, and of their consequent invalidity. *Olds* v. *Alvord,* 191 So. 434, text 449. *Sutliff* v. *Lake County Commissioners,* 147 U. S. 230, 37 L. Ed. 145.

To uphold these bonds is to do violence to the letter and spirit of Article 12, to frustrate its settled meaning and policy. It is to snap the chain that holds the schools to a firm anchorage—to set the public free schools of the State adrift to be buffeted around by every wind and wave that may arise on a political sea. To hold them invalid will hurt their present owners. Still it is not as if they would lose all, for no doubt a court of equity would, as it has before, give them a lien upon the building into which their money went. *Nuveen* v. *Board,* 5 Cir., 88 F. (2d) 175, a Florida case. But if they could have no relief, as said by the North Dakota court in a similar case, their hurt will be of "small consequence compared with the permanent injury which would be done to the people of the state if the courts, to which they have committed the preservation of their constitutional rights and the integrity of the Constitution itself, should fail in the performance of their duty." *State* v. *McMillan,* 96 N. W. 310.

Point Three: The court erred in sustaining the summary judgment.

Rule 56 (c) provides for summary judgments in given cases. It says that the judgment sought shall be rendered

if the pleadings, depositions and admissions on file, together with the affidavits, if any, show "there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law."

This is to say that there must be a material fact put in issue, and that such issue must be genuine, as opposed to colorable, or sham, else judgment will be entered. There are two elements, materiality and genuineness.

The denial that the coupons were clipped from bonds issued by petitioner certainly was material, because if the denial was true petitioner owed nothing on them. *City of Hialeah* v. *Groves*, 5 Cir., 101 F. (2d) 951. This would seem so self-evident as to justify no further discussion.

The only other inquiry is whether the issue was a sham or whether it was genuinely tendered. Bad faith in filing this defense should not be presumed, yet it was nowhere asserted by respondents in their motion (R. 9803, p. 17). One who denies he signed a note may be held to have filed a sham plea when the note with his signature on it is produced before the court. Emphatically that is not the situation here. Petitioner did not deny it issued any bonds, or any coupons.

The complaint shows that respondents sued on coupons which they claimed were clipped from bonds issued by petitioner; that the coupons were not signed by petitioner, but that they bore only lithographed signatures—signatures put upon the coupons by machine (R. 9803, p. 5). See also stipulation (R. 9803, p. 34-a). Without saying they were, it may be said that such machine made coupons are capable of being exactly reproduced, so that petitioners could not tell the real from the reproduced, as it stated on oath it could not (R. 9803, p. 15), there being no way petitioner could identify them so as to admit their genuineness. Throughout the Rules of Civil Procedure runs the idea that

a want of knowledge as to a fact, so stated, is equivalent to denial of such fact.

Under these circumstances was petitioner required to obligingly admit the coupons were clipped from bonds executed by it. The only inference to be drawn from the decision of the Circuit Court of Appeals is that petitioner could not in good faith deny they were. Petitioner is a public body. It owes the citizens it represents the duty of exercising all prudence and caution, and to hold that it could not genuinely deny facts which it could neither know, or reasonably ascertain, is to establish a principle not permissible in a jurisprudence that proceeds on caution and hears before it condemns. The defense was filed in good faith. It was a genuine issue. It was material. This ought to have ended the summary judgment motion.

But it is said that respondents attached to their motion an affidavit of Mr. Bowerman of Cook County, Illinois, in which he said he clipped these coupons from bonds issued by petitioner. So they did (R. 9803, p. 19). Is it going to be held that *ex parte* affidavits are admissible to prove material and genuine issues? In an ordinary trial a party would be laughed out of court who tried to prove his case by affidavits. Yet he is no more entitled to do it because he is moving under summary judgment procedure. No such purpose is attributable to this rule. The purpose of the rule is to afford a method of determining whether there is a genuine material issue to try—not to try such an issue in a summary way on affidavits. *Merchants Indemnity Corp.* v. *Peterson*, 3 Cir., 113 F. (2d) 4; *Wynant* v. *Crittenden*, U. S. C. A., D. C., 113 F. (2d) 170.

There is a sort of notion growing up in some of the lower courts that affidavits may on summary judgment procedure be used as evidence to prove the issues made by the pleadings. *Cudahy Packing Co.* v. *United States*, 37 Fed. Supp. 563, text 569, is illustrative. This is a mistaken and a dan-

gerous notion. So far as we can find this Court has not passed upon this question.

Moore's Federal Practice, Vol. 3, page 3174, discusses the question thus:

> "To attain this end, the rule permits a party to pierce the allegations of fact in the pleadings * * * where there are no genuine issues of fact to be tried. The court is authorized to examine the evidence, not for the purpose of trying the issue but to determine whether there is a genuine issue of fact proper for trial."

And again on page 3184:

> "Thus it is often repeated that 'the court is not authorized to try the issue (of fact), but is to determine whether there is an issue to be tried.' Other cases caution that the court should not pass on questions of credibility or weight of evidence and that the summary judgment procedure 'should not be perverted to the trial of disputed questions of fact upon affidavits.'" See also pocket supplement, page 85.

The Circuit Court of Appeals never said in so many words that the issue was or was not genuine. It did say it was permissible to meet it by affidavit, as was done, there being no counter affidavit filed by petitioner.

It can hardly be said no counter affidavit was filed. Respondents served petitioner with a notice to admit the genuineness of the coupons (R. 9803, p. 13). This was answered under oath (R. 9803, p. 15) and served on respondents August 19, 1940 (stipulation, R. 9803, p. 34-a), the very day notice of motion for summary judgment was served (R. 9803, p. 17). In this answer petitioner said under oath that the coupons were not attached to any bonds issued by it and it could not admit they were genuine because they "do not bear upon their face any means of identification." This left the issue of their genuineness stand-

ing. If an issue as to whether the printed coupons were the obligations of petitioner can genuinely be made, then it was made and it subsisted throughout the proceeding. The only office of the Bowerman affidavit was to meet and overcome that issue. To thus use affidavits is no more justified on summary judgment procedure than on a regular trial.

The *bona fides* of the issue were not impeached, nor even attacked, by the Bowerman affidavit, or otherwise. He deposed that he clipped the coupons from bonds issued by petitioner (R. 9803, p. 19). That may be true or it may not. He may have thought the bonds he clipped them from were issued by petitioner, but they might not have been. His affidavit lets him be the judge of all these matters, and at the same time protects him against cross-examination in case he is purposely or innocently wrong. Petitioner could hardly be expected to state under oath that Bowerman was wrong, either by mistake or on purpose. Its position was that it didn't know, that it had a right to test Bowerman by cross-examination. If there had been irregularity in some of these coupons, this would not justify an oath that Bowerman's affidavit was false. If no irregularity in them had yet appeared, this did not mean that Bowerman swore the truth. The fundamental fact is that before the door was closed by judgment there should have been a trial and an opportunity to cross-examine Bowerman. If in the future someone else should show up with coupons corresponding to these in suit still attached to bonds issued by petitioner, there would be no defense to them. The court ought not to have entered judgment until opportunity to exclude such possibility had been afforded. It is not necessary to say such a thing will happen, for it condemns the judgment to say it possibly can happen.

Conclusion.

It is earnestly contended:

(1) That the Circuit Court of Appeals was bound by lower Florida Court decisions holding the bonds void, the Supreme Court being divided evenly, and that it erred in disregarding this binding source of State law, which is presumed right by the Supreme Court of Florida until the contrary is shown; that the contrary could not be shown to the Circuit Court of Appeals, it appearing the Florida Court was evenly divided; and that due regard for such lower court rule on the question at bar would have led to affirmance and not reversal of the judgment entered in favor of petitioner by the District Court (Point One);

(2) That the evidence of State law found in the *Mowat* case and prior cases leaves no substantial doubt that the bonds at bar are void and that the Circuit Court of Appeals should have so held (Point Two);

(3) That summary judgment was erroneously entered against petitioner (Point Three); and

(4) That the judgments of the Circuit Court of Appeals should be reviewed and reversed.

Respectfully submitted,

O. K. Reaves,
Attorney for Petitioner,
Tampa, Florida.

APPENDIX "A".

Article XII, Florida Constitution.

ARTICLE XII.

Education.

Section 1. The Legislature shall provide for a uniform system of public free schools and shall provide for the liberal maintenance of the same.

Section 2. There shall be a Superintendent of Public Instruction, whose duties shall be prescribed by law, and whose term of office shall be four years and until the election and qualification of his successor.

Section 3. The Governor, Secretary of State, Attorney-General, State Treasurer and State Superintendent of Public Instruction shall constitute a body corporate, to be known as the State Board of Education of Florida, of which the Governor shall be President, and the Superintendent of Public Instruction Secretary. This Board shall have power to remove any subordinate school officer for cause, upon notice to the incumbent; and shall have the management and investment of all State School Funds under such regulations as may be prescribed by law, and such supervision of schools of higher grades as the law shall provide.

Section 4. The State School Fund, the interest of which shall be exclusively applied to the support and maintenance of public free schools, shall be derived from the following sources. The proceeds of all lands that have been or may hereafter be granted to the State by the United States for public school purposes. Donations to the State when the purpose is not specified. Appropriations by the State. The proceeds of escheated property or forfeitures. Twenty-five per cent of the sales of public lands which are now or may hereafter be owned by the State.

Section 5. The principal of the State School Fund shall remain sacred and inviolate.

Section 6. A special tax of one (1) mill on the dollar of all taxable property in the State, in addition to the other

means provided, shall be levied and apportioned annually for the support and maintenance of public free schools.

Section 7. Provision shall be made by law for the apportionment and distribution of the interest on the State School Fund, and all other means provided, including the special tax, for the support and maintenance of public free schools among the several counties of the State in proportion to the average attendance upon schools in the said counties respectively.

Section 8. Each county shall be required to assess and collect annually for the support of the public free schools therein, a tax of not less than three (3) mills, nor more than ten (10) mills on the dollar on all taxable property in the same.

Section 9. The county school fund shall consist, in addition to the tax provided for in section eight of this article, of the proportion of the interest of the State school fund and of the one mill State tax apportioned to the county; the net proceeds of all fines collected under the penal laws of the State within the county; all capitation taxes collected within the county; and shall be disbursed by the county board of public instruction solely for the maintenance and support of public free schools.

Section 10. The Legislature may provide for the division of any county or counties into convenient school districts; and for the election biennially of three school trustees, who shall hold their office for two years, and who shall have the supervision of all the schools within the district; and for the levying and collection of a district school tax, for the exclusive use of public free schools within the district, whenever a majority of the qualified electors thereof that pay a tax on real or personal property shall vote in favor of such levy: Provided, that any tax authorized by this section shall not exceed ten mills on the dollar in any one year on the taxable property of the district.

Section 11. Any incorporated town or city may constitute a School District. The fund raised by Section Ten may be expended in the district where levied for building or repair-

ing school houses for the purchase of school libraries and text-books, for salaries of teachers, or for other educational purposes, so that the distribution among all the schools of the district be equitable.

Section 12. White and colored children shall not be taught in the same school, but impartial provision shall be made for both.

Section 13. No law shall be enacted authorizing the diversion or the lending of any County or District School Funds, or the appropriation of any part of the permanent or available school Fund to any other than school purposes; nor shall the same, or any part thereof, be appropriated to or used for the support of any sectarian school.

Section 14. The Legislature at its first session shall provide for the establishment, maintenance, and management, of such Normal Schools, not to exceed two, as the interests of public education may demand.

Section 15. The compensation of all county school officers shall be paid from the school fund of their respective counties, and all other county officers receiving stated salaries shall be paid from the general funds of their respective counties.

Section 16. (Proposed section defeated at general election of 1908.)

Section 17. The Legislature may provide for special tax school districts to issue bonds for the exclusive use of public free schools within any such special tax school district, whenever a majority of the qualified electors thereof who are freeholders shall vote in favor of the issuance of such bonds, but no bonds shall be issued hereunder which shall exceed, together with the existing indebtedness of such special tax school district 20 per cent of the assessed value of the taxable property of such district according to the last assessment for State and County purposes prior to the issuing of such bonds. Any bonds issued hereunder shall become payable within thirty years from the date of issuance in annual instalments which shall commence not more than

three years after the date of issue. Each annual instalment shall be not less than three per cent of the total amount of the issue. Whenever any such special tax school district has voted in favor of the issuance of such bonds a special tax for the payment of the interest on said bonds and the principal thereof as the same shall become due and payable, shall be levied on the taxable property within the district voting for their issuance in accordance with law, providing for the levy of taxes and such tax shall not be applied to any purpose other than the payment of the principal and interest of said bonds.

APPENDIX "B".

Statute Under Which Bonds at Bar Were Issued.

CHAPTER 10,655—(No. 633).

AN ACT to Authorize the Board of Public Instruction of Hernando County, Florida, to Procure a Loan of not Exceeding Seventy-five Thousand Dollars ($75,000.00) and Pay Interest Thereon at a Rate not Exceeding Six Per Cent (6%) Per Annum, for the Purpose of Acquiring Land within said County and Erecting Thereon and Furnishing a High School Building to belong to the said Board, wherein to Maintain a County High School for said Hernando County; to Authorize said Board, in Order to Procure said Loan, to Issue and Sell not Exceeding Seventy-five Thousand Dollars ($75,000.00) in Principal Amount of Interest Bearing Coupon Bonds; to make Provision for a Sinking Fund for the Retirement of said Bonds and the Interest to Become Due Thereon and to Regulate the Expenditures of the Sum Derived from the sale of Said Bonds.

Be It Enacted by the Legislature of the State of Florida:

Sec. 1. *When it shall appear necessary for the* maintenance and support of the public free schools of Hernando County, Florida, that there be erected therein a high school building to belong to said County Board wherein to maintain a county high school for said Hernando County, in order to accommodate the attendance and permit the in-

struction of the pupils of said County, entitled to attend and be instructed at such County high school, and there are no available funds in the County School fund for said County to provide for the acquisition of land and the erection and furnishing of such high school building, and the Board of Public Instruction of said County shall by resolution duly adopted and recorded in its minutes find the facts to be as aforesaid, then and thereupon said Board, in order to raise the funds required to provide for the acquisition of land within said County and the erection thereon and furnishing of a high school building, shall be and is hereby authorized to borrow such amount of money as said Board shall determine necessary for the purposes aforesaid, not to exceed the sum of Seventy-five Thousand Dollars ($75,000.00), and pay interest upon such loan at a rate, to be determined by said Board, not in excess of six per cent (6%) per annum. In order to procure said loan, and to evidence the agreement of said Board to repay the same with interest as aforesaid, said Board shall have authority to issue and sell, not exceeding Seventy-five Thousand Dollars ($75,000.00) in principal amount, of interest bearing coupon bonds of said Board, to be signed by the Chairman and Secretary of the Board, to be issued with the official seal of said Board affixed, to be in such denomination or denominations, in such form and bearing such rate of interest, payable annually or semi-annually, not to exceed six per cent (6%) per annum, as said Board may provide in its resolution authorizing the issuance of said bonds. Said bonds shall be payable at such time as said Board shall determine to be expedient, except that none of said bonds shall be issued to run for a longer period of time than thirty years from the date of issue. Said bonds shall be numbered consecutively, beginning with Number One, and each bond shall have attached thereto interest coupons to evidence the interest of the principal bonds to which the same shall be attached, and it shall be sufficient for each interest coupon to bear the printed or lithographed facsimile signature of the Chairman and Secretary of said Board.

Sec. 2. The sale of the bonds herein authorized may be made either publicly or privately as said Board may determine, but none of said bonds shall be sold by said Board for less than the principal amount thereof.

Sec. 3. Said County Board shall have the power to procure the loan and issue and sell the bonds authorized under the provisions of this Act, unaffected by and independently of any existing statutes relating to the borrowing of money by said Board. Nor shall the issuance and sale of bonds authorized by this Act be deemed to constitute a borrowing of money by said Board within the meaning of the provisions of Section 458 of the Revised General Statutes of Florida, and said Board shall have authority to borrow money for the purpose authorized by said Section 458 of the Revised General Statutes unaffected by the issuance and outstanding of any bonds authorized by this Act.

Sec. 4. All moneys arising from the sale of the bonds authorized by this Act shall be applied by said County Board exclusively to the purposes for which said bonds were issued, provided, however, that after the said purposes have been carried out, if there exists any surplus arising from the sale of said bonds, such surplus may be used and applied by said Board as it may determine proper for the support and maintenance of the public free schools of said Hernando County.

Sec. 5. That whenever bonds shall be issued in the manner hereinabove indicated, it shall be the duty of the Board of County Commissioners of Hernando County, Florida, to levy annually a tax on all taxable property in the County, the amount of said tax to be determined by resolution of the Board of Public Instruction for the County of Hernando, State of Florida, and said tax when levied shall be a part of the tax provided for by Section 8 of Article 12 of the Constitution of the State of Florida, said tax to be levied for the purpose of paying the interest when due and creating a sinking fund for the payment of the principal of said bonds

at the maturity of same, which said sinking fund shall be provided for by resolution of said Board of Public Instruction before issuing bonds under any of the provisions of this Act. All taxes for the payment of interest and to create a sinking fund for the retirement of said bonds, shall be assessed, equalized and collected upon all the taxable property in the County of Hernando, State of Florida, by the same officers and in the same manner as provided by law for the assessment, equalization and collection of other county taxes. It shall be the duty of the County Tax Collector to turn over to the bank or banks of Hernando County, Florida, which shall have lawfully qualified as depositaries of the Board of Public Instruction for the County of Hernando, State of Florida, all money collected for said interest and sinking fund, to be at all times by such county depository or depositories kept and maintained in a separate fund, and said fund shall be subject to the control of the County Board of Public Instruction, for the County of Hernando, State of Florida, for the sole purpose of paying the interest due on said bonds and retiring the same at their maturity.

Sec. 6. Should it seem advisable to said Board of Public Instruction for the County of Hernando, State of Florida, to invest the sinking fund collected for the retirement of the bonds herein referred to, said Board shall have the right and the privilege so to do in the same manner and according to the terms and provisions provided by Section 594 of the Revised General Statutes of the State of Florida, governing the investment of the sinking fund accumulated for the retirement of Special Tax School District bonds.

Sec. 7. This Act shall take effect immediately upon its passage and approval of the Governor, or its becoming a law without the approval of the Governor.

Approved April 24, 1925."

APPENDIX "C".

Proceedings State Ex Rel. Vickery vs. Mowat.

On the 1st day of November, A. D. 1939, the Alternative Writ of Mandamus was filed in words and figures as follows:

IN THE CIRCUIT COURT IN AND FOR THE FOURTEENTH JUDICIAL CIRCUIT IN AND FOR BAY COUNTY, FLORIDA

Bay County.

STATE OF FLORIDA, Ex Rel. L. E. VICKERY, Relator,

vs.

D. MOWAT, as Chairman of the Board of Public Instruction of Bay County, Florida, W. R. NICHOLS and D. D. JONES, as Members of said Board of Public Instruction, Respondents.

Alternative Writ of Mandamus.

The State of Florida To:

D. Mowat, as Chairman of the Board of Public Instruction of Bay County, Florida, W. R. Nichols and D. D. Jones, as Members of said Board of Public Instruction

Greetings:

WHEREAS, by petition for an alternative writ of mandamus filed in this cause by L. E. Vickery as relator, brought in the name of the State of Florida on relation of L. E. Vickery against you, the said D. Mowat, as Chairman of the Board of Public Instruction of Bay County, Florida, W. R. Nichols and D. D. Jones, as members of said Board of Public Instruction, respondents, it has been made to appear:

1. That the Board of Public Instruction of Bay County, Florida, pursuant to resolutions of said Board duly passed, approved and adopted pursuant to and in conformity with the provisions of House Bill No. 708, Chapter 10366, Acts of the Legislature of 1925, did issue and sell certain bonds

designated Board of Public Instruction of Bay County, Florida, High School Bonds, each of said bonds being in the sum of $1,000.00, and by the terms of each of said bonds the Board of Public Instruction of Bay County, Florida, for value received, acknowledged itself to owe, and promised to pay the bearer the sum of $1,000.00, with interest thereon from the date thereof until paid, at the rate of 6% annually, payable semi-annually, on the first day of June and December of each year, upon presentation and surrender of the coupons thereto annexed as they severally became due, the said bonds and interest coupons being payable at the banking house of the National City Bank in the City of New York, State of New York.

2. That each of said bonds recited that the full faith and credit of the Board of Public Instruction of Bay County, Florida, was irrevocably pledged to the payment of same; that each of said bonds recited that it was one of a series of like bonds of like date, tenor and amount, except as to maturity, issued by the Board of Public Instruction of Bay County, Florida, for the purpose of raising funds to purchase grounds and to erect and furnish a high school building to belong to said Board of Public Instruction of Bay County, Florida, for the use and benefit of the people of Bay County, Florida, and was issued pursuant to resolution of the Board of Public Instruction of Bay County, Florida, duly passed, approved and adopted as required by law and pursuant to and in conformity with the provisions of the said Legislative Act aforesaid; that each of said bonds further recited that all acts, conditions, and things required by the law of the State of Florida by said Legislative Act aforesaid to exist, happen, and be performed precedent to and in the issuance of this bond, did exist, had happened and been performed, as required by law, and that said bond together with all other indebtedness of said Board of Public Instruction of Bay County, Florida, did not exceed any limit prescribed by the Constitution or Statutes of the State of Florida; that each of said bonds was executed under the corporate seal of said Board of Public Instruction of Bay County, Florida, signed by the Chairman of the Board, attested by the Secretary thereof.

3. That each of said bonds, including the bond of relator hereinafter mentioned was validated and confirmed by decree of the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida, rendered the 18th day of July, 1925, and bore a certificate to that effect duly signed by the Clerk of said Court.

4. That, as appears from the public records of said Bay County, Florida, prior to the passage of said Act, Chapter 10366, Acts of 1925, Bay County, Florida, had been divided into sixteen special tax school districts; that the said High School Building provided for in said Act was built and erected in Panama City, Florida, and in Tax District No. 12 of Bay County, Florida, and may be attended by any and all high school students in said Bay County.

5. That relator is the owner and holder of one of said bonds, to-wit, Bond No. 20, which became due and payable on June 1, 1934, a copy of which said bond is hereto attached and marked Exhibit "A" and made a part hereof; that each of said bonds aforesaid were and are identical in form and tenor, except as to maturity date and number thereof.

6. That relator is the owner and holder of interest coupons numbered 17 and 18 attached to said bond, which matured on December 1, 1933, and June 1, 1934, respectively, copies of which are attached hereto as Exhibits "B" and "C" respectively, and made a part hereof.

7. That there is due relator upon said bond and said interest coupons the sum of $1,060.00; that although relator has demanded payment of said bond and coupons from defendant since the maturity thereof, defendant has failed and continues to fail to pay the same or any part thereof.

8. That Section 5 of said Chapter 10366, Acts of the Legislature of Florida, 1925, among other things, provides:

"That whenever bonds shall be issued in the manner hereinabove indicated, it shall be the duty of the Board of County Commissioners of Bay County, Florida, to levy annually a tax on all taxable property in the County, the amount of said tax to be determined by resolution of the Board of Public Instruction for the County of Bay, State of

Florida, and said tax when levied shall be a part of the tax provided for by Section 8 of Article 12 of the Constitution of the State of Florida, said tax to be levied for the purpose of paying the interest when due and creating a sinking fund for the payment of the principal of said bonds at a maturity of same, which said sinking fund shall be provided for by resolution of said Board of Public Instruction before issuing bonds under any of the provisions of this Act."

9. That the said Board of Public Instruction duly determined by resolution offered, adopted, and approved by said Board, that the tax levy under said Section 8 of Article 12 of the Constitution should for the year 1939-1940 be ten mills, the maximum permitted to be levied under said Section 8, Article 12 of the Constitution of Florida, but that said Board of Public Instruction and the members thereof failed, neglected, and refused to make any provision for any part of said taxes to go into a sinking fund as provided in said Section 5 aforesaid for the purpose of retiring relator's bond or any of said bonds issued under said Act.

10. That said Board of Public Instruction and the members thereof have failed, neglected, and refused in all previous years to establish or set up a sinking fund for the retirement of bonds or coupons, or any part thereof, issued under said Act aforesaid, so that there is not now any sinking fund or any other funds in the hands of said Board of Public Instruction out of which relator's bond and interest coupons aforesaid, or any part thereof, can be paid.

11. That it is the duty of the Board of Public Instruction for the County of Bay, State of Florida, under the provisions of said Chapter 10366, Acts of Florida 1925, and under the terms of the bonds issued thereunder to levy or cause to be levied a tax on all taxable property within the County of Bay, State of Florida, including homesteads, regardless of value, sufficient in amount to pay the principal and interest of said bonds issued under said Act, and it is the duty of the said Board of Public Instruction to appropriate for the payment of the bonds and interest coupons of relator herein a sum of money sufficient in amount to pay the same, and to appropriate in their budget for the fiscal year 1939-

1940 out of the constitutional ten mills levy, which will produce a sum in excess of $20,000.00, a sum sufficient in amount to pay said bonds and interest coupons; that said Board of Public Instruction has failed to appropriate in its budget for the year 1939-1940 any sum for the payment of said bond and interest coupons herein described, and unless the said members of said Board of Public Instruction are required by this court to amend its budget so as to appropriate sufficient of said ten mills constitutional levy to the payment of said bond and interest coupons herein described, they will not do so, and relator will be unable to collect its said bond and coupons.

12. That relator is entitled to writ of this court commanding the said Board of Public Instruction and the members thereof to revise and amend its said budget so as to appropriate a sufficient amount of said constitutional ten mills levy as is necessary to pay relator's said bond and interest coupons, and relator is without remedy save by the issuance of such a writ.

Now, Therefore, we being willing that full and speedy justice shall be done in the premises do command you, D. Mowat, as Chairman of the Board of Public Instruction of Bay County, Florida, W. R. Nichols and D. D. Jones, as members of said Board of Public Instruction, to forthwith duly assemble and pass all necessary resolutions to amend your budget for the year 1939-1940 by appropriating to the payment of the bond and interest coupons of relator a sufficient amount of the constitutional ten mills tax levy, levied under Section 8, Article 12 of the Constitution of Florida, to pay the same, and do further command you, D. Mowat, as Chairman of the Board of Public Instruction of Bay County, Florida, W. R. Nichols and D. D. Jones, as members of said Board of Public Instruction, to pay over all moneys received by you from said levy for the payment of said bond and interest coupons of relator to relator or his attorney of record, as and when said taxes are collected in whole or in part, or that you appear before this court on the 1st day of November, 1939, at 10:00 o'clock A. M., and show cause why you should not be required so to do.

Witness the Honorable Ira A. Hutchinson, Judge of the above court, this the 28 day of October, A. D. 1939.

H. A. PLEDGER,
Clerk of Circuit Court in and for Bay County, Florida.

(Seal of the Circuit Court, Bay County, Florida.)

Number 20 $1000.00

Number 20 $1000.00

UNITED STATES OF AMERICA,
State of Florida,
County of Bay:

Board of Public Instruction of Bay County, Florida High School Bond.

Know All Men by These Presents, That the Board of Public Instruction of the County of Bay, State of Florida, for value received, hereby acknowledges itself to owe, and promises to pay to the bearer on the first day of June, A. D. 1934, the principal sum of One Thousand Dollars with interest thereon from the date hereof until paid, at the rate of six per cent (6%) per annum, payable semi-annually on the first day of June and the first day of December of each year, upon presentation and surrender of the interest coupons hereto annexed, as they severally become due. Both principal and interest of this bond are payable at the banking house of the National City Bank in the city of New York, State of New York, and for the payment of the principal of this bond and the interest thereon when due, the full faith, credit and resources of the Board of Public Instruction of Bay County, Florida, are hereby irrevocably pledged.

This Bond is one of a series of bonds of like date, tenor and amount, except as to maturity, numbered One to One Hundred (1 to 100) inclusive, issued by the Board of Public Instruction of Bay County, Florida, for the purpose of

raising funds to purchase school grounds and to erect and furnish a High School Building to belong to the said Board of Public Instruction of Bay County, Florida, for the use and benefit of the people of Bay County, Florida and is issued pursuant to resolutions of the Board of Public Instruction of Bay County, Florida, duly passed, approved and adopted, as required by law, and in pursuance to and in conformity with the provisions of House Bill No. 708, Acts of 1925, approved 28th day of May, 1925.

It Is Hereby certified, recited and declared that all acts, conditions and things required by the law of the State of Florida by said House Bill No. 708, Acts of 1925, to exist, happen and be performed precedent to and in the issuance of this bond exist, have happened and been performed in due and regular time form and manner, as required by law, and that this series of bonds, together with all other indebtedness of said Board of Public Instruction, does not exceed any limit prescribed by the Constitution or Statutes of the State of Florida.

In Witness Whereof, The Board of Public Instruction of Bay County, Florida, have caused this bond to be executed by the Chairman of said Board, attested by the Secretary of said Board and its corporate seal to be hereunto affixed and has caused the interest coupons hereto attached to be executed with the lithographed facsimile signatures of said Chairman and Secretary, respectively, and this bond to be dated the first day of June 1925.

R. D. MURRAY,
Chairman Board of Public Instruction of Bay County, Florida.

Attest:

C. C. MATHIS,
Sec'y Board of Public Instruction of Bay County, Florida.

(Seal.)

Endorsed on the back as follows: United States of America. Number 20. Board of Public Instruction of Bay County, Florida, State of Florida, County of Bay. High

School Bond $1,000. Per 6 cent. Principal Due June 1, 1934, Interest Payable June 1st & December 1st. Principal and Interest Payable at the Banking House of the National City Bank In the City and State of New York. Validated and confirmed by decree of the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida, rendered the 18th day of July 1925. W. H. Marshall, Clerk Circuit Court.

Exhibit A.

$30.00.

On the first day of Dec. 1933 The Board of Public Instruction of Bay County, Florida, will pay to the bearer at the Banking House of the National City Bank of the City of New York the sum of thirty dollars ($30.00) being six months interest then due on its High School Bond No. 20.

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R. D. MURRAY,
Chairman Board of Public Instruction.
Attest: C. C. Mathis, Secretary.

Exhibit B.

$30.00.

On the first day of June, 1934 the Board of Public Instruction of Bay County, Florida, will pay to the bearer at the Banking House of the National City Bank of the City of New York the sum of thirty dollars ($30.00) being six months interest then due on its High School Bond No. 20.

R. D. MURRAY,
Chairman Board of Public Instruction.
Attest: C. C. Mathis, Secretary.

Exhibit C.

On the 1st day of November, A. D. 1939, the Final Judgment quashing Alternative Writ and entering Final Judgment was filed; said Final Judgment being recorded in

Circuit Court Minute Book 5, Page 375, in words and figures as follows:

IN THE CIRCUIT COURT IN AND FOR THE FOURTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY.

Bay County

STATE OF FLORIDA, EX REL., L. E. VICKERY, *Relator*,

v.

D. MOWAT, as Chairman of the Board of Public Instruction of Bay County, Florida, W. R. NICHOLS and D. D. JONES, as Members of the Said Board of Public Instruction, *Respondents.*

This cause coming on before the Court to be heard upon motion to quash filed by the respondents herein, and the Court having heard arguments of counsel, and being fully advised in the premises, it is, therefore now

Considered, Ordered and Adjudged that said motion be and the same is hereby granted, and that said alternative writ of mandamus issued herein be and the same is hereby quashed, set aside and annulled. Relator having announced he did not desire to amend or further plead, it is further

Considered, Ordered and Adjudged that respondents go hence without day and that relator take nothing by this writ; that respondents do have and recover from the relator their costs in this behalf to be taxed by the clerk of this court.

Done and Ordered at Panama City, Florida, this the 1st day of November, A. D. 1939.

IRA A. HUTCHISON,
Judge.

IN THE SUPREME COURT OF FLORIDA, JUNE TERM, A. D. 1939

Bay County

STATE OF FLORIDA, EX REL., L. E. VICKERY, *Appellant*,

vs.

D. MOWAT, as Chairman of the Board of Public Instruction of Bay County, Florida, W. R. NICHOLS and D. D. JONES, as Members of Said Board of Public Instruction, *Appellees.*

TERRELL, *C. J.:*

The Appellant as Relator and holder of bond Number 20, issued by the Board of Public Instruction of Bay County pursuant to Chapter 10366, Acts of 1925, brought this proceeding in mandamus against the said Board of Public Instruction to require it to impose a tax on all the taxable property in Bay County sufficient to pay the principal and interest on said bond and others of the same issue. A motion to quash the alternative writ was granted, final decree was entered, and this writ of error was prosecuted.

In fine, Chapter 10366, authorizes the Board of Public Instruction of Bay County to issue bonds not to exceed $100,000 in amount for the purpose of erecting a central high school building for the use of the County, the said bonds to run not exceeding thirty years and to be retired serially. A portion of the County school fund raised under Section Eight of Article Twelve of the Constitution of Florida, was appropriated under the act to pay interest on and retire said bonds.

The sole question raised in the Court below and brought here for determination is the power of the legislature to authorize the use of funds raised under Section Eight of Article Twelve of the Constitution to pay interest on and retire the bonds so issued.

It appears that the bonds brought in question were issued in June, 1925, and were validated by decree of the Circuit Court, that a County high school building was constructed with the proceeds of said bonds and has for years been in use by the County, that interest was paid on the bonds until 1931, when further payments were restrained by decree of the Circuit Court, that said restraining order was later dissolved but no further payments have been made on principal or interest of the bonds and so far as the record discloses the school term has not been diminished.

It is contended by appellee that the judgment below should be affirmed because all school funds raised under Section Eight of Article Twelve must be used for the support and maintenance of the public schools of the county and that no part of it can be used for the construction of buildings. This contention is supported by the decisions of this Court. See State *v.* Board of Public Instruction of Dade County, 126 Fla. 142, 170 So. 602, where this question is fully covered, and we pointed out that the Constitution provided a complete scheme for the support of the public schools and for the construction of school buildings.

We do not in any sense depart from the law as stated in the last cited case. If the payment of interest and retirement of the bonds brought in question with the funds appropriated tended to disrupt the school term, we might be forced to hold them invalid. The record, however, makes no such showing and for all that may be gathered from it, quite the contrary is the case.

Chapter 10366 does not appropriate all the funds possible to be raised under Section Eight of Article Twelve to pay interest on and retire said bonds. It only appropriates a portion of these funds and it is not shown that the use of the funds appropriated for building purposes materially interfered with the support of the public schools of the County. In fact, it is shown that the schools were continued for six years and the bonds were serviced for a like period and the service on the bonds was cut off because of the injunction previously referred to.

While we do not approve this method of financing the construction of high school buildings, at the same time after bonds are issued and validated and have been in the hands

of innocent purchasers for fourteen years and the county has had the use of the building for that time, we must decline to hold them invalid at the instance of the Board of Public Instruction when only a portion of the funds raised under Section Eight of Article Twelve are appropriated to service them and it is not shown that the support of the school was materially affected.

When the support of the public schools of the county is provided for, there can be no objection to using any remaining portion of the funds raised under Section Eight of Article Twelve to construct a countywide high school building. State *v.* Board of Public Instruction, 86 Fla. 254, 97 So. 384. A board of public instruction should not be permitted under the guise of a constitutional guaranty to provide a facility like a high school building for the county and then turn around and use the same constitutional guaranty to defeat its obligation to pay for the facility so acquired and being used for public school purposes.

If this can be done, sanctity of contract becomes nothing more than a windy platitude. It extracts the moral element from the law, the property that saves it from becoming effete and putrid. Bereft of its moral philosophy, the fundamental and statutory law of a democracy becomes as bread without salt, as a woman without charm, or a man without honor. The spirit of it has departed and nothing remains but dry bones too inert to rattle.

Having reached this conclusion, it follows that the judgment below must be and is hereby reversed.

Reversed.

WHITFIELD, P. J., and CHAPMAN, J. J., concur.

BROWN, BUFORD and THOMAS, J. J., dissent.

IN THE SUPREME COURT OF FLORIDA, JANUARY TERM, A. D. 1940, EN BANC

Bay County

STATE OF FLORIDA, EX REL., L. E. VICKERY, *Appellant*,

vs.

D. MOWAT, as Chairman of the Board of Public Instruction of Bay County, Florida, W. R. NICHOLS and D. D. JONES, as Members of said Board of Public Instruction, *Appellees.*

Opinion Filed February 9, 1940

An Appeal from the Circuit Court for Bay County, Ira A. Hutchison, Judge, J. M. & H. P. Sapp, for Appellant; Stokes & Douglas and Mabry, Reaves, Carlton & White, for Appellees.

Per CURIAM:

In this cause Mr. Chief Justice Terrell, Mr. Justice Whitford and Mr. Justice Chapman are of the opinion that the decree in this cause should be reversed while Mr. Justice Brown, Mr. Justice Buford and Mr. Justice Thomas are of the opinion that the said decree should be affirmed. When the members of the Supreme Court sitting six members in a body and after full consultation, it appears that the members of the Court are permanently and equally divided in opinion as to whether the decree should be affirmed or reversed, and there is no prospect of an immediate change in the personnel of the Court, the decree should be affirmed; therefore it is considered, ordered and decreed under the authority of State ex rel. Hampton *v.* McClung, 47 Fla. 224, 37 So. R. 51, that the decree of the Circuit Court in this cause be and the same is hereby affirmed.

Affirmed.

TERRELL, C. J., WHITFIELD, BROWN, BUFORD, CHAPMAN and THOMAS, J.J., concur.

I, Guyte P. McCord, Clerk of the Supreme Court of Florida, do hereby certify that the above and foregoing is a true and correct copy of the Alternative Writ of Manda-

mus including copy of the Bond and Coupon involved and attached as Exhibits thereto; copy of the Order of the Court Below upon the Motion to Quash filed by Respondents; copy of Opinion written by Chief Justice Terrell and copy of Order of Court Affirming the Circuit Court in and for Bay County, Florida in that certain cause recently pending in this Court wherein the State of Florida ex rel. L. E. Vickery was Appellant and D. Mowat, as Chairman of the Board of Public Instruction of Bay County, Florida, W. R. Nichols and D. D. Jones, as Members of said Board of Public Instruction were Appellees as the same appears among the Records and Files in my said Office.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the Supreme Court at Tallahassee, Florida, this 20th day of May, A. D. 1940.

[Supreme Court Seal.]

GUYTE P. MCCORD,
Clerk Supreme Court of Florida.

APPENDIX "D".

Statute Under Which Vickery vs. Mowat Bonds Were Issued.

CHAPTER 10,366—(No. 344).

AN ACT to Authorize the Board of Public Instruction of Bay County, Florida, to Procure a Loan of not Exceeding One Hundred Thousand Dollars ($100,000.00), and to Pay Interest Thereon at a rate not Exceeding Six Per cent (6%) per Annum for the Purpose of Erecting and Furnishing a High School Building to Belong to the Said Board, Wherein to Maintain a County High School for Said Bay County; To Authorize Said Board, in order to Procure Said Loan, to Issue and Sell Not Exceeding One Hundred Thousand Dollars ($100,000.00) in Principal Amount of Interest Bearing Coupon Bonds; to Make Provision for a Sinking Fund for the Retirement of said Bonds and the

Interest to Become Due Thereon, and to regulate the Expenditure of the Sum Derived from the Sale of Said Bonds.

Be It Enacted by the Legislature of the State of Florida:

Section 1. When it shall appear necessary for the maintenance and support of the public free school of Bay County, Florida, that there be erected therein a high school building to belong to the County Board of Public Instruction of said County wherein to maintain the County High School for said Bay County, in order to accommodate the attendance and permit the instruction of the pupils of said County entitled to attend and be instructed at such County High School, and there are no available funds in the County School Fund of said County to provide for the erection and furnishing of such high school building, and the Board of Public Instruction of said County shall by resolution duly adopted and recorded in its minutes find the facts to be as aforesaid, then and thereupon said Board, in order to raise the funds required to provide for the erection thereof and furnishing of a high school building shall be and is hereby authorized to borrow such amount of money as said Board shall determine necessary for the purposes aforesaid, not to exceed the sum of One Hundred Thousand Dollars ($100,000.00), and to pay interest upon said loan at a rate, to be determined by said Board, not in excess of six per cent (6%) per annum. In order to procure said loan, and to evidence the agreement of said Board to repay the same with interest as aforesaid, said Board shall have authority to issue and sell not exceeding One Hundred Thousand Dollars ($100,000.00) in principal amount of interest bearing coupon bonds of said Board, to be signed by the Chairman and Secretary of said Board, to be issued with the official seal of said Board affixed, to be in such denomination or denominations, in such form and bearing such rate of interest, payable annually or semi-annually, not to exceed six per cent (6%) per annum, as said Board may provide in its resolution authorizing the issuance of said Bonds. Said bonds shall be payable within thirty (30) years from the date of issuance in annual installments which shall commence not more than three (3) years after the date of issue.

Each annual installment shall be not less than three per cent (3%) of the total amount of the issue. Said Bonds shall be numbered consecutively, beginning with the number one (1) and each bond shall have attached thereto interest coupons to evidence the interest on the principal thereof, and it shall be sufficient for each interest coupon to bear the printed or lithographed facsimile signatures of the Chairman and Secretary of said Board.

Sec. 2. The sale of the bonds herein authorized may be made either publicly or privately as said Board may determine, but none of said bonds shall be sold by said Board for less than the principal amount thereof. All funds realized from the sale of said bonds shall be deposited in the depositories as named by said Board, as the custodians thereof, and drawn out on proper warrants for the purpose of paying for the work and material, as the same progresses, and the necessary expenses incident to the issue, sale and delivery of said bonds.

Sec. 3. Said County Board shall have the power to procure the loan and issue and sell the bonds authorized under the provisions of this Act, unaffected by and independently of any existing statutes relating to the borrowing of money by said Board. Nor shall the issuance and sale of the bonds authorized by this act be deemed to constitute a borrowing of money by said Board within the meaning of the provisions of Section 458 of the Revised General Statutes of Florida, and said Board shall have authority to borrow money for the purpose authorized by said Section 458 of the Revised General Statutes unaffected by the issuance and outstanding of any bonds authorized by this act.

Sec. 4. All moneys arising from the sale of the bonds authorized by this Act shall be applied by said County Board exclusively to the purpose for which said bonds were issued, provided, however, that after the said purposes have been carried out, if there exists any surplus arising from the sale of said bonds, such surplus may be used and applied by said Board as it may determine proper for the support and maintenance of the public free schools of said Bay County.

Sec. 5. That whenever bonds shall be issued in the manner hereinabove indicated, it shall be the duty of the Board of County Commissioners of Bay County, Florida, to levy annually a tax on all taxable property in the County, the amount of said tax to be determined by resolution of the Board of Public Instruction for the County of Bay, State of Florida, and said tax when levied shall be a part of the tax provided for by Section 8 of Article 12 of the Constitution of the State of Florida, said tax to be levied for the purpose of paying the interest when due and creating a sinking fund for the payment of the principal of said bonds at the maturity of same, which said sinking fund shall be provided for by resolution of said Board of Public Instruction before issuing bonds under any of the provisions of this Act. All Taxes for the payment of interest and to create a sinking fund for the retirement of said bonds, shall be assessed, equalized and collected upon all taxable property in the County of Bay, State of Florida, by the same officers and in the same manner as provided by the law for the assessment, equalization and collection of other County taxes. It shall be the duty of the County Tax Collector to turn over to the bank or banks of Bay County, Florida, which shall have lawfully qualified as depositories of the County Board of Public Instruction of the County of Bay, State of Florida, all money collected for said interest and sinking fund, to be at all times by such County Depository or Depositories kept and maintained in a separate fund, and said fund shall be subject to the control of said County Board of Public Instruction for the sole purpose of paying the interest due on said bonds and retiring the same at their maturity.

Sec. 6. Should it seem advisable to said County Board of Public Instruction of Bay County, State of Florida, to invest the sinking fund collected for the retirement of the bonds herein referred to, said Board shall have the right and privilege so to do in the same manner according to the terms and provisions provided by Section 594 of the Revised General Statutes of the State of Florida governing the investment of the sinking fund accumulated for the retirement of Special Tax School District Bonds.

Sec. 7. This Act shall take effect immediately upon its passage and approval by the Governor or upon its becoming a law without the approval of the Governor.

APPENDIX "E".

Statute Under Which Warren vs. Hillsborough County Bonds Were Issued.

CHAPTER 9464—(No. 346).

AN ACT to Authorize the Board of Public Instruction of Hillsborough County, Florida, to procure a Loan of not exceeding Two Hundred Thousand Dollars ($200,000.00) and pay interest thereon at a rate not exceeding seven per cent (7%) per annum, for the purpose of enlarging the high school building belonging to the said Board, located in the City of Tampa, and wherein is maintained the county high school for said Hillsborough County, and for the purpose of furnishing such enlargement of said high school building; to authorize said Board in order to procure said loan, to issue and sell not exceeding Two Hundred Thousand ($200,000.00) in principal amount of interest bearing coupon warrants; to make provision for a sinking fund for the retirement of said warrants and the interest to become due thereon; to regulate the expenditure of the sum derived from the sale of said warrants; and to provide for the validation of said warrants.

Be It Enacted by the Legislature of the State of Florida:

Section 1. When it shall appear necessary for the maintenance and support of the public free schools of Hillsborough County, Florida, that the high school building, located in the City of Tampa, belonging to said County Board and wherein is maintained the county high school for said Hillsborough County, be enlarged and such enlargement thereof be furnished, in order to accommodate the attendance and permit the instruction of the pupils of said county, entitled to attend and be instructed at such county high

school, and there are no available funds in the county school fund of said county to provide the enlargement of said building and the furnishing of such enlargement, and the Board of Public Instruction of said county shall by resolution duly adopted and recorded in its minutes find the facts to be as aforesaid, then and thereupon, said Board, in order to raise the funds required to provide the necessary enlargement of said high school building and furnish such enlargement, shall be and is hereby authorized to borrow such amount of money as said Board shall determine necessary for the purpose aforesaid, not to exceed the sum of Two Hundred Thousand Dollars ($200,000.00), and pay interest upon such loan at a rate, to be determined by said Board, not in excess of seven per cent (7%) per annum. In order to procure said loan, and to evidence the agreement of said Board to repay the same with interest as aforesaid, said Board shall have authority to issue and sell, not exceeding Two Hundred Thousand Dollars ($200,000.00) in principal amount, of interest bearing coupon warrants of said Board, to be signed by the Chairman and Secretary of the Board, to be issued with the official seal of said Board affixed, to be in such denomination or denominations, in such form and bearing such rate of interest, payable annually or semi-annually, not to exceed seven per cent (7%) per annum, as said Board may provide in its resolution authorizing the issuance of said warrants. Said warrants shall be payable at such time as said Board shall determine to be expedient, except that none of said warrants shall be issued to run for a longer period of time than fifteen years from the date of issue. Said warrants shall be numbered consecutively, beginning with Number One, and each warrant shall have attached thereto interest coupons, to evidence the interest to become due thereon prior to maturity, each coupon shall bear the number of the principal warrant to which the same shall be attached, and it shall be sufficient for each interest coupon to bear the printed or lithographed facsimile signature of the Chairman and Secretary of said Board. Said warrants and interest coupons shall be issued upon and payable out of the county school fund of said Hillsborough County, be

payable to bearer, and shall be directed to any depository of the county school fund of said Hillsborough County. Said Board may, in its discretion, when authorizing the issuance and sale of said warrants, provide that all or any part of said warrants may be retired on any interest due date, before maturity, upon payment of each principal warrant with accrued interest and an additional premium of not exceeding one per cent (1%) of the warrant or warrants so retired before their maturity.

Sec. 2. Before the sale and delivery of any warrants authorized by this Act, said Board shall by resolution provide for a sinking fund for the payment of said warrants and the interest thereon, as the same become due and payable, which sinking fund shall be provided out of the county school fund arising each year, until all said warrants are retired, provided that said sinking fund shall not exceed in any year the equivalent of one-half of one mill upon the dollar on all the taxable property in said Hillsborough County. It shall be the duty of said Board each year until all the warrants and interest due thereon issued under the authority of this Act are retired, to set apart out of the county school fund of said county a sufficient amount of money to pay all of said warrants and interest coupons becoming due during said year, and out of the amount so set aside annually, to pay and retire all of said warrants and interest coupons becoming due during such year, provided, that said Board shall not be required annually to set aside for said purpose an amount in excess of the equivalent of one-half of one mill upon the dollar on all the taxable property in said Hillsborough County. The sum required to be set aside annually as aforesaid shall not be subject to be used otherwise or applied than as above provided, except that any excess existing in the amount so set aside, after the warrants and interest coupons have been paid for the payment of which said amount was so provided, may be applied as said Board shall direct for any other proper use of the schools of said county.

Sec. 3. The sale of the warrants herein authorized may be made either publicly or privately as said Board may

determine, but none of said warrants shall be sold by said Board at less than the par value thereof.

Sec. 4. Said County Board shall have the power to procure the loan and issue and sell the warrants authorized under the provisions of this Act, unaffected by and independently of any existing provisions of law relating to the borrowing of money by said Board. Nor shall the issuance and sale of the warrants authorized by this Act be deemed to constitute a borrow of money by said Board within the meaning of the provisions of Section 458 of the Revised General Statutes of Florida, and said Board shall have authority to borrow money for the purpose authorized by said Section 458 of the Revised General Statutes unaffected by the issuance and outstanding of any warrants authorized by this Act.

Sec. 5. All moneys arising from the sale of the warrants authorized by this Act shall be applied by said County Board exclusively to the purposes for which said warrants were issued, provided however, that after the said purposes have been carried out, if there exists any surplus arising from the sale of said warrants, such surplus may be used and applied by said Board as it may determine proper for the support and maintenance of the public free schools of said Hillsborough County.

Sec. 6. Said Board may, if it deems the same expedient, proceed to have the warrants hereby authorized validated under the provisions of Sections 3296 to 3301 inclusive of the Revised General Statutes of the State of Florida upon petition filed by said County Board.

Sec. 7. This Act shall take effect immediately upon its passage and approval by the Governor, or its becoming a law without the approval of the Governor.

Became a law without the approval of the Governor.

APPENDIX "F".

Amendment to Florida Constitution Adding Seventh Judge.

HOUSE JOINT RESOLUTION No. 54.

A Joint Resolution Proposing an Amendment to Section 2 and to Section 4 of Article V of the Constitution of Florida Relating to the Judiciary Department.

Be It Resolved by the Legislature of the State of Florida:

That the following amendment of Section 2 and Section 4, respectively, of Article V of the Constitution of the State of Florida, be, and the same is hereby agreed to, and shall be submitted to the electors of the State of Florida at the next general election to be held on the first Tuesday after the first Monday in November, 1940, for ratification or rejection.

Section 2. (a) The Supreme Court shall consist of Seven (7) Justices and the term of office of each Justice shall be six years; no term of any incumbent shall be affected by this amendment.

(b) Each Justice of the Supreme Court shall be elected by the qualified electors of the State at the time and places of voting for members of the legislature, at the general election next preceding the expiration of each term of such office.

(c) In the event of the ratification of this amendment it shall thereupon be the duty of the then Governor to appoint one additional Justice of the Supreme Court and he shall hold office from the date of his appointment until Tuesday after the first Monday in January, 1943, and his successor shall be elected at the general election in 1942 to hold office for a term of six years beginning Tuesday after the first Monday in January, 1943.

(d) The successors of the Justices of the Supreme Court shall be elected at the general election next preceding the expiration of their respective terms of office, but in event of a vacancy in office of any Justice and there be an unexpired term the successor shall be elected for the balance of the unexpired term.

Section 4. (a) The Supreme Court may hear, consider and determine cases and exercise all its powers and juris-

diction as a single body in which case a majority of the members of the Court shall constitute a quorum for the dispatch of business; or it may exercise its powers and jurisdiction in divisions.

(b) The Circuit Judges shall at all times be subject to call to the Supreme Court by that Court or the Chief Justice thereof, and during the call shall be members thereof as associate justices to act in place of any absent, disqualified or disabled justice or for assignment to a division, but no division shall include more than one Circuit Judge. A division shall consist of three members of said court exclusive of the Chief Justice, and the judgment of a division concurred in by the Chief Justice shall be the judgment of the Court unless such case involves (1) capital punishment, or (2) the determination of a State or Federal constitutional question wherein shall be brought into controversy the constitutionality of a Federal or State statute, rule, regulation or municipal ordinance, or (3) there be a dissent to the proposed judgment of a division by a member thereof or the Chief Justice, or (4) ordered by the Chief Justice to be considered by two divisions; whereupon it shall require the consideration of two divisions and the Chief Justice.

(c) The Chief Justice shall be the chief administrative officer of the Court and responsible for the dispatch of business and procuring consistent decisions; he shall not be required to examine the record of a cause but may accept the conclusions of fact found by a division and state in the opinion or accompanying statement and act upon the law so stated and discussed and its application to such fact, but in event of an equal division between those members properly considering a cause, he shall examine the record and participate therein as other justices. In the event the Chief Justice be unable to act for any cause the Justice longest in continuous service and able to act shall act instead with like effect.

Filed in Office Secretary of State, June 12, 1939.

Adopted at General Election 1940, and Seventh Justice appointed November 25, 1940. See list of Florida Justices front 198 Southern Reporter.

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Office - Supreme Court, U. S.
FILED
SEP 8 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 512

BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF HERNANDO, STATE OF FLORIDA, a body corporate under the Laws of the State of Florida.

Petitioner

vs.

W. J. MEREDITH, JAMES G. MARTIN, and A. R. OHMART,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE WRIT OF CERTIORARI

ROBERT J. PLEUS,
JOSEPH P. LEA, JR.,
First National Bank Building,
Orlando, Florida.

Counsel for Respondents.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 512

BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF HERNANDO, STATE OF FLORIDA, a body corporate under the Laws of the State of Florida.

Petitioner

vs.

W. J. MEREDITH, JAMES G. MARTIN, and A. R. OHMART,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE WRIT OF CERTIORARI

The writ of certiorari should be denied because:

(a) The decision, construing a State statute, followed all binding decisions of the State of Florida.

(b) The decision followed the great weight of authority in the State of Florida.

(c) The statute is not shown to be unconstitutional beyond all reasonable doubt.

(d) The procedure in entering final judgment on affidavits was correct procedure under the Federal Rules of Civil Procedure.

STATEMENT OF CASE

1. Respondents, as innocent holders, instituted suit on coupons from bonds issued by the Board of Public Instruction of Hernando County, Florida, under authority of Chapter 10,655, Laws of Florida, 1925. Prior to delivery the bonds had been validated by judicial decree (R. 9461, 38). The lower court held the act unconstitutional, the bonds void, and entered judgment against the Respondents.

2. The judgment by the lower court was appealed. During the pendency of the appeal, and prior to its determination, the Supreme Court of Florida, by an evenly divided court, affirmed the opinion of the lower court on a similar act in *State ex rel, Vickery vs. Mowat,* 141 Fla. 710, 193 So. 751. The Circuit Court of Appeals, 112 F. (2) 914, determined that it was not bound by the decision of the evenly divided Supreme Court of Florida, followed the great weight of authority, reversed the decision of the lower court, and held the act constitutional and the bonds valid.

3. After the mandate came down, the Defendant, without leave of court, filed new defenses, denying execution of the instruments and denying that the coupons were detached from bonds executed by the Defendant. Request for admission of facts showing the execution and the validity of the coupons

was served upon the Defendant pursuant to Rule 36 of the Federal Rules of Civil Procedure. The Defendant neither admitted nor denied the execution of the instruments, nor the validity of the originals served upon them. Thereupon, Respondents filed ex parte affidavits (R. 9803, 17) and judgment was formally entered against the Defendant accordingly. The procedure in entering the judgment was appealed. It was affirmed (119 F. (2) 712).

ARGUMENT

I.

The State Court decision was not binding upon the Federal Court.

The Petitioner contends that the lower court decision of *State ex rel Vickery vs. Mowat*, 141 Fla. 710, 193 So. 751, affirmed by an evenly divided Supreme Court, although contrary to the great weight of authority in the State, became the binding precedent which all courts in the State of Florida, and the Federal Courts, lower and appellate, are bound.

Such a decision, by an evenly divided appellate court, has no binding effect whatsoever, under the rule of *stare decisis*, on either an appellate court of the State of Florida, on a lower court, or, by the same reasoning, on a Federal District or Appellate Court.

Hampton vs. McClung, 47 Fla. 224, 37 So. 51.

Dale vs. Jennings, 90 Fla. 234, 107 So. 175, 181.

Heitz vs. Woodman, 218 U. S. 205, 54 L. Ed. 1001.

Williams vs. New York, P. & N. R. Co., 11 F. (2) 363.

14 Am. Jur. 294.

The argument of the Petitioner is that the Supreme Court of the State of Florida not being able to render a binding decision on a similar statute, this Court must then look to the lower court's decision holding a similar act unconstitutional, and that such decision is absolutely binding on the Federal Appellate Court. Its contention is that the Federal Court, parrot like, must echo a decision of a lower state court when the state appellate court could not make a binding decision on the same point. The fallacy of the argument is seen in its premise.

No other court in the State of Florida is bound by such a pronouncement of the Supreme Court of Florida or by the lower court. Even the lower court itself is not bound in subsequent actions by other parties on the same subject matter. The fact that the Supreme Court of Florida was divided evenly on the case leaves all courts, state and Federal, free to disregard all phases of that case as a binding precedent in future litigation, or, as stated in *Hampton vs. McClung, supra:*

> "* * the judgment possesses no dignity as a judicial precedent. It carries upon its face a badge which precludes any application of it in future under the doctrine of stare decisis. The judges simply agree that it is expedient to finish the litigation."

It is not amiss at this time to observe that the Honorable A. V. Long, a judge of the Northern District of Florida on September 23, 1940, rendered a final judgment, under case No. 23, against the Board of Public Instruction of Bay County on bonds issued under the very same statute, which the Supreme

Court of the State of Florida was unable to agree upon, and which statute counsel for Petitioner claims is identical with the one which is the subject of these proceedings, which judgment is recorded in new Civil Minute Book 1, at page 159, of the Records of the United States District Court for the Northern District of Florida, Marianna Division.

Counsel for Petitioner places unabiding and, it must be said, hopeful faith in the pronouncements of this Court in the cases of *West vs. American Telephone and Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 146; and *Fidelity Union Trust Company vs. Field*, 31 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 176; holding that where a court of last resort in a State has not passed upon a question, the Federal Courts are then bound by the decisions of an intermediate state court on the point. In the *West* case, a decision was rendered by a trial court, which was reversed by an *intermediate appellate* court. The State Supreme Court then refused to review the decision of the intermediate appellate court on a suggestion of "probable error". Thus we have, in effect, a decision by a Supreme Court of the State affirming the decision of the intermediate appellate court. Note, however, the significant language used by the Supreme Court of the United States in that case:

> "Where an intermediate *appellate* State Court rests its considered judgment upon the rules of law which it announces, that is a datum for ascertaining State law which is not to be disregarded by a Federal Court unless it is convinced by *other persuasive data that the highest court of the State would decide otherwise.*" (Emphasis supplied.)

Thus, the "persuasive data" was there. The Supreme Court of the State had refused to review the decision of the inter-

mediate appellate court, thereby placing its stamp of approval on that appellate decision and clearly determining that the Supreme Court of the State would have decided the case as the appellate court did.

In the *Fidelity Union Trust Company* case, supra, the Federal Court had refused to follow the lower court decision rendered by the Chancery Court of New Jersey. The Supreme Court of the United States made this significant observation:

> "In the absence of any contrary showing, the rule of the Thatcher and Travers cases *appears to be the one which would be applied in litigation in the State Court* and whether believing it to be sound or unsound it should have been followed by the Circuit Court of Appeals."

We agree with counsel for the Petitioner that the Federal Courts should follow the State Court decisions in a state where the lower court decisions are binding and where it appears that the decision is the one which would be applied in future litigation in the state court, but the decision of the lower court in the Bay County case (*State ex rel. Vickery vs. Mowat, supra*) is not a decision "which would be applied in litigation in the State Court". Moreover, the "persuasive data", as enunciated in the American Telephone and Telegraph case by the highest court of the State of Florida, is not in accord with the decision of the lower court in the Vickery case. The one point that the Supreme Court of the State of Florida definitely decided in the Mowat case was that the lower court decision was not a binding precedent on any other court in the State of Florida; that the decision had no force or effect whatsoever. The perfect answer to the contention made by the Petitioner that the decision of the Circuit Court is a binding precedent which must be followed by the Federal Courts,

notwithstanding the fact that the Supreme Court of Florida was unable to agree on the point, is answered in the old case of *Fraser vs. Willey*, 2 Fla. 116, referring to an evenly divided opinion:

> "It may be said that there is a *sub modo* decision, inasmuch as there is a judgment of the court, but at most it would appear a decision by operation of law, and not by the court, a majority being necessary to produce that result. *Nor can we involve the decision of the judge at nisi prius to be thrown in one scale or the other.* The case comes *de novo*, with the facts already ascertained, the counsel better and more maturely prepared than in the court below, and is to be decided by a tribunal possessing all the advantages of an appellate court."

By the same reasoning and by the many adjudicated decisions in the State of Florida, beginning with *Fraser vs. Willey* and *Hampton vs. McClung*, supra, the decision of the appellate court and the decision of the lower court have no binding force whatsoever, and any court in the State of Florida, as well as the Federal Courts, is free to pursue its own independent judgment in determining the legal liability of the Board on its obligations. This, the Circuit Court of Appeals did.

II.

The decision follows the great weight of authority in the State of Florida.

These facts are apparent:

(a) The bonds were issued pursuant to Chapter 10,655, Laws of Florida, Special Acts 1925.

(b) The bonds, prior to delivery, were validated by a judicial decree.

(c) The bonds were issued for the purpose of constructing a county high school in Hernando County, Florida.

(d) At the time of the execution and delivery of the bonds, and at the time of their validation, the Supreme Court of Florida had held that such bonds, issued for the purpose of enlarging a county high school, were valid and binding obligations of a Board of Public Instruction.

The bonds issued by the various Boards of Public Instruction in the State of Florida have been a source of prolific litigation. The Constitution of Florida provides (See Appendix "A", page 27) that each county shall be required to assess and collect annually for the *support* of the public free schools therein a tax of not less than three (3) and not more than ten (10) mills. Legislation has been enacted to carry out this constitutional provision. Chapter 10,655, Laws of Florida, Special Acts 1925, authorized the bonds to be issued by the Board of Public Instruction of Hernando County, Florida, to construct a countywide high school building, the bonds to be paid from taxes authorized by Section 8 of Article XII of the Constitution of the State of Florida. Thus, the question narrows itself down to a simple proposition of whether or not the construction of a county high school is for the "support" of the public free schools of the county, and whether or not, under the great weight of authority, not only at the time of issuance of the bonds but at all times since then, it has been determined that bonds could be issued to construct countywide high schools. A review of all leading cases in the State of Florida will clearly drive home to this Court that it has been determined:

(1) At the time of the issuance of the bonds herein sued upon that instruments issued for the purpose of raising money to construct buildings by the Board of Public Instruction were valid obligations;

(2) That recovery has never been denied on Board of Public Instruction bonds under similar cricumstances.

In order that this Court may get a true picture of the development of the laws of the State of Florida, the leading cases have been condensed and are herein chronologically listed by dates showing the points involved and the disposition of the cases:

(1898) *State ex rel Bours vs. L'Engle,* 40 Fla. 392, 24 So. 539, was a mandamus proceeding to require the County Commissioners to call an election to determine whether county bonds could be issued as authorized by an act of the Legislature to purchase school sites. The Court held that the Act violated Section 8 of Article XII because the county taxes authorized were not a part of the school levy as required by said section, but definitely implied that had they been made a part of the school levy (generally known as the General County 10-mill levy), the Act would have been valid.

The Constitution was amended in 1912, adding Section 17 of Article XII (Special School Districts).

(1921) *Johnson vs. Board of Public Instruction,* 81 Fla. 503, 88 So. 308, in a validating decree of Special Tax School District bonds, held that Section 17 of Article XII (first added to the Constitution in 1912) was designed to supplement the funds provided by Section 10 of Article XII (having to do with school districts and the district levies for maintenance)

so as to more amply provide the facilities for which bonds are usually issued. The Court held that the Constitution did not contemplate the issuance of bonds payable in the future for defraying general expenses of running and operating such schools. The implication definitely was that bonds could be issued for the purpose of acquiring sites, or building *permanent* facilities—these being the usual cause or purpose for the issuance of bonds.

(1922) *Leonard vs. Franklin,* 84 Fla. 402, 93 So. 688, enjoined the issuance of interest bearing warrants for the purpose of providing funds to acquire, build and equip public high school buildings in *stated special tax school districts* because it violated Sections 10, 11 and 17 of Article XII—the Court holding that Section 17 (added in 1912) showed an intent that buildings in stated special tax school districts for the *use of such districts* should be paid for by district obligations. However, nothing in this case held that county-wide obligations payable out of the general county school fund for the purpose of erecting a building *for the use of the county as a whole* could not be validly issued.

(1923) *Warren vs. Board of Public Instruction,* 86 Fla. 234, 97 So. 384, affirmed a decree of the Circuit Court of Hillsborough County, refusing to enjoin the issuance of Board of Public Instruction time warrants under Chapter 9464, Acts of 1923, for the purpose of *enlarging and furnishing* a high school building in Hillsborough County with payment to be made out of the proceeds of the levy provided by Section 8 of Article XII of the Constitution of Florida.

Thus, it is up to and including 1923, every case before the Court came before the Court prior to the issuance of

bonds—either by validation proceedings or by injunction. The decision in the Warren case was clear, unambiguous, and precisely on point—holding that a Board of Public Instruction could issue bonds to be paid from taxes levied under Section 8 of Article XII of the Constitution of Florida.

It was during the period of time from 1923 to 1928 that the majority of the Board of Public Instruction bonds were issued in Florida, the reason being two-fold: (1) The great Florida "boom" was in progress, and obviously school facilities had to be increased; and (2) two hurricanes hit the State, destroying many school buildings.

1925—The bonds, which are the subject of this action, were issued—for the same purpose the Supreme Court had approved in the Warren case—to build a countywide high school. The bonds were validated by judicial decree prior to delivery in June, 1925.

Compare the title of the act involved in the Warren case (Chapter 9464, Acts 1923) (Appendix B, page 29) with the title in the Hernando case, Chapter 10,655, Special Acts 1925, (Appendix C, page 30). They are, for all intents and purposes, identical.

(1928) *Barrow vs. Moffet*, 95 Fla. 111, 116 So. 71, was a validation proceeding. The Court refused to validate bonds issued by the Board of Public Instruction of Highlands County for the purpose of funding a *floating indebtedness*, the bonds to be re-paid from the future proceeds inuring to the Board under Section 8 of Article XII. The Court held that the Constitution contemplated payment when due of expenses for maintenance and support and did not contemplate an issue

of bonds to pay for a past indebtedness. The Court distinguished the Warren case and said:

> "In the Warren Case, the statute authorized interest-bearing time warrants to raise money for present and future needs in 'the maintenance and support' of free schools in the county, not the payment of outstanding indebtedness."

Thus, the Court again reaffirmed the propriety of bonds for the purpose of acquiring permanent facilities for present and future needs, but refused to validate bonds for the purpose of paying current indebtedness from the proceeds of future taxes.

(1929) The case of *State vs. Board of Public Instruction for Indian River County*, 98 Fla. 1152, 125 So. 357, was a validation proceeding. The bonds were to be issued to pay teachers' salaries and to repair, furnish and equip any public school building, or pay any other operating expense. The Court held the authorizing act violative of Section 9 of Article XII, upon the ground that the Constitution does not permit the county school fund to be used for the payment of bonds issued for county school *current expenses.*

(1930) *Board of Public Instruction of Lafayette County vs. Union School Furnishing Co.*, 100 Fla. 326, 129 So. 824, injected the first bit of confusion in the law on the subject. A suit for reformation and for judgment. Certain notes payable from future funds evidencing an indebtedness were held invalid on authority of the *Leonard v. Franklin*, and *Barrow v. Moffet*, supra.

(1933) *Board of Public Instruction for Lafayette County vs. First National Bank of Gainesville*, 111 Fla. 4, 143 So.

738, re-hearing 149 So. 213. Sections 566 to 568, C. G. L. 1927, were held valid as permitting a Board of Public Instruction to anticipate its requirements and borrow money against its anticipated receipts for the current year. The Court held that such Board must be held to the same degree of integrity and liability as an individual in its action as a corporate body.

(1933) *Board of Public Instruction of Okaloosa County vs. Kennedy*, 109 Fla. 153, 147 So. 250, permitted recovery on a certificate of indebtedness issued to evidence money due for services rendered in transporting pupils. The Court held that although the Constitution contemplates the payment of school indebtedness when and as due, it did not necessarily mean that an indebtedness once lawfully incurred for the support and maintenance of public free schools might not be made lawfully payable at a later date out of the proceeds derived from the authorized tax levy under Section 8 of Article XII. The Court did away with the illogical distinction between funding a past due indebtedness and issuing bonds for current operating expenses.

Thus, the Court reiterated its former holding in the Warren case and held that there is no difference between the power to issue bonds (1) to pay current expenses when the revenues fall short, or (2) to issue bonds to fund a floating indebtedness accumulated in the past, or (3) to defray the cost of "permanent school facilities, lands, buildings, or equipment", the cost of which is chargeable against the funds of each scholastic year for which the same are used. This case is not distinguishable upon the basis that the Court was discussing funds arising under Sections 10 or 17, and not funds arising under Section 8 of Article XII. The Court was con-

cerned with and decided solely the liability of a Board of Public Instruction, as such, on obligations payable out of the county school fund, and not the special district funds.

(1934) *State Bank of Bowling Green vs. Board of Public Instruction of Hardee County*, 116 Fla. 184, 156 So. 319, held the Board liable upon warrants issued by it to represent its share of the outstanding school indebtedness of DeSoto County out of which Hardee County was created in 1921. Note this significant language:

> "An indebtedness once lawfully incurred for the support and maintenance of the public free schools, as authorized by law, and within the limitations of the Constitution, if not paid when due, continues as a charge payable at a later date out of the revenues derived from the authorized tax levy required to be made for school purposes. State ex rel. Gibson and Board of Public Instruction of Monroe County v. Bervaldi, 103 Fla. 902, 138 So. 380; State ex rel. Board of Public Instruction of Gadsden County v. County Com'rs. 17 Fla. 418."

(1935) *Logan vs. Board of Public Instruction for Polk County*, 18 Fla. 184, 158 So. 720, involved the funds of a *special tax school district.* The Court held that the law contemplated that money lawfully and in good faith borrowed and used by proper officers for authorized school purposes should be repaid, even though current expenditures must be curtailed. The Court further held there was implied authority to borrow funds for a special tax school district with no express prohibition against the same in the Constitution.

(1934) *City Bank of New York vs. Board of Public Instruction of Manatee County, McCloskey vs. Board of Public*

Instruction of Manatee County, and *Westgate, Inc., vs. Board of Public Instruction of Manatee County*, 11 Fed. Supp. 570, was an action to reduce to judgment certain refunding bonds issued in 1919 to refund a floating indebtedness. The Court held valid an act providing for the issuance of bonds to fund such floating indebtedness. The prior cases were cited, and the Barrow, Indian River and Union School Furnishing Co. cases, supra, were held *inapplicable to bonds issued prior to the decision in them.* It applied correctly the rule first announced by the Supreme Court of the United States in *Gelpcke vs. Dubuque*, 1 Wall 175, 17 L. Ed. 520, to the effect that the decisions in effect at the time of the issuance of the bonds would be followed.

The Supreme Court of the United States in the Dubuque case correctly refused to follow the later contrary decision, and held that rights which had become vested under the original decision could not be divested by a mere "oscillation" in the decisions of the Supreme Court of the State. See *Bacon vs. Texas*, 163 U. S. 207, 41 L. Ed. 132.

When Federal jurisdiction is supported upon the ground of diversity of citizenship and a suit is brought originally in a Federal Court, the Supreme Court of the United States, in the exercise of its coordinate jurisdiction to construe the State law, will follow the earlier, rather than the later decisions of the State Courts. See *Central Land Co. vs. Laidley*, 159 U. S. 103, 40 L. Ed. 91. Thus, the decision in *Erie Railroad Co. vs. Tompkins*, 82 L. Ed. 787, has no bearing.

(1936) *Fidelity Life Association vs. Board of Public Instruction for Martin County* and *Board of Public Instruction for Polk County vs. Gillespie*, 81 F. (2) 586, (C. C. A. 5) was

an action to reduce bonds to judgment. The Court upheld the validity of acts authorizing the issuance of interest bearing bonds to fund a past due indebtedness, and could find no implied limitation against the Legislature's power to grant such authority.

(1936) *State vs. Board of Public Instruction for Dade County*, 126 Fla. 142, 170 So. 602, in a validation proceeding followed the decisions of the Federal Courts and permitted validation of refunding bonds to be issued to refund two types of indebtedness of the Board of Public Instruction of Dade County:

(a) For funding an outstanding indebtedness incurred in operating the public schools of the county, and

(b) For *repairing* and furnishing public school buildings in Dade County damaged or *destroyed* by the hurricane in 1926.

In this opinion the Court cites with authority the Warren case, supra, involving the Hillsborough County high school, and specifically states that both as to county school funds and special tax school district funds, the Legislature may use school funds to build buildings:

> "If not pledged for other purposes, the Board of Public Instruction has implied authority to use these funds for *buildings, repairs, permanent equipment*, and other school purposes."

(1938) *Hamrick vs. Special Tax School District No. 1 of Jefferson County*, 130 Fla. 453, 178 So. 406, made the very significant distinction between the facilities acquired by

a special tax school district and open solely to those residing within that district, and county-wide facilities usable by the county as a whole. It pointed out that school facilities exclusively for a *particular* district are to be paid by taxation of the property in the district and that such entities are separate and distinct from countywide functions.

(1939) *Board of Public Instruction for Brevard County, Florida, vs. Osborn,* (C. C. A. 5) 101 F. (2) 919. The Court had before it and held valid bonds authorized to fund a *floating indebtedness* theretofore incurred for the support of the public schools. Any question as to a valid pledge of the county-wide levy, provided for by Section 8 of Article XII to pay principal or interest on bonds issued to acquire or build a county-wide high school was not involved. However, the dicta referring to the school fund can be no stronger than the cases on which it is based, which were all except the Warren case, decided subsequent to the issuance of the bonds. Dicta on this score was specifically limited to the citation of cases which had either refused issuance or validation of such bonds —and in fact the cases cited were not cases involving the question in the suit at bar, and the Court was prompt to call attention to the situation that exists where bonds or time warrants have been validated and sold and do not embarrass the operation of the schools.

Thus, all of the leading cases on the subject to the year 1939 have consistently held that bonds issued by a Board of Public Instruction, validated, and placed on the market to pay for (a) enlarging, or (b) repairing school buildings were valid obligations and that innocent bona fide holders thereof could recover thereon. Then came the unusual case of *State ex rel. Vickery vs. Mowat,* supra, the lone star in the heaven

of decisions to the contrary which the Petitioner points to this Court as the one which it must blindly follow.

The case was an action to require a levy of taxes to pay bonds issued by the Board of Public Instruction of Bay County, Florida, which bonds were authorized under Chapter 10,366, Special Acts, Laws of Florida, 1925. This Chapter is identical with Chapter 10,655, Laws of Florida, Special Acts 1925. Note the titles of the two acts, Appendix C, page 30 and Appendix D, page 31. On a writ of error to the Supreme Court of Florida, from a lower court decision holding the act void, Judge Terrell of that court wrote an opinion holding the chapter authorizing the Bay County Board of Public Instruction bonds valid (See Appendix E, page 32). Note this significant language used by him:

Judge Terrell, of the Supreme Court of the State of Florida, wrote an opinion holding the chapter authorizing the Bay County Board of Public Instruction bonds valid (See Appendix E, page . .). Note this significant language used by Judge Terrell:

> "A board of public instruction should not be permitted under the guise of a constitutional guaranty to provide a facility like a high school building for the county and then turn around and use the same constitutional guaranty to defeat its obligation to pay for the facility so acquired and being used for public school purposes.
> "If this can be done, sanctity of contract becomes nothing more than a windy platitude. It extracts the moral element from the law, the property that saves it from becoming effete and putrid. Bereft of its moral philosophy, the fundamental and statutory law of a democracy becomes as bread without salt, as a woman without charm, or a man without honor. The spirit of it

has departed and nothing remains but dry bones too inert to rattle."

However, a majority of the Court could not agree to the opinion, so a decision without an opinion (See Appendix F, page 36) was entered. Specific reference to the *Hampton* case, supra, was made in the opinion, thus clinching forever the proposition that the decision has no authority under the rule of *stare decisis;* is not binding on any State court, either appellate or lower. This divided opinion was in effect at the time the Circuit Court of Appeals decided the instant case. Obviously that court was no more bound by the decision than any other court in the State of Florida.

An examination of these leading cases as compared with this one case, decided by an evenly divided court, should leave no doubt in this Court's mind but that the Circuit Court of Appeals was not bound by the decision and was clearly correct in following the great weight of authority and holding the bonds valid.

III.

The Statute not shown unconstitutional beyond all reasonable doubt.

If the Supreme Court of the United States is to grant a writ of certiorari and thus make a determination of whether or not a statute enacted by the Legislature of the State of Florida is repugnant to the Florida Constitution, it must be shown beyond all reasonable doubt that the act is repugnant to the State Constitution. That is to say, it must be shown that the Circuit Court of Appeals has decided a question of local law in a way probably in conflict with the applicable local

decisions of the State of Florida. Do the decisions of the State of Florida show such an act to be unconstitutional beyond all reasonable doubt? Obviously not.

It has been heretofore aptly shown that:

(1) The Circuit Court of Appeals was not bound by either the opinion of the Supreme Court of Florida or the lower court in the case of *State ex rel. Vickery vs. Mowat, supra.*

(2) The decision of the Supreme Court of the State of Florida, evenly divided, is contrary to the clear weight of authority in the State of Florida.

The sole question now remains is whether or not Chapter 10,655, Laws of the State of Florida, Acts of 1925, authorizing the issuance of the Hernando County Board of Public Instruction bonds, on an independent determination thereof by the Circuit Court of Appeals, assuming that that Court was not bound by either the appellate or lower court decision in the evenly divided opinion of *State ex rel. Vickery vs. Mowat, supra,* is so repugnant to the Constitution of the State of Florida that the Supreme Court of the United States must step in, reverse the Circuit Court of Appeals, and strike the statute down as contrary to the Constitution of the State of Florida. The Supreme Court of the State of Florida refused to strike it down by an evenly divided opinion.

The law is well settled in Florida that no duly enacted statute should be judicially declared inoperative on the ground that it violates organic law, unless it clearly appears beyond all reasonable doubt under any rational view that may be taken of the statute, it is in positive conflict with some identified or designated provision of constitutional law.

Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L. R. A. 1916 D, 913, Ann. Cas. 1915 D, 99; *Lainhart v. Catts*, 73 Fla. 735, 75 So. 47; *Stewart v. DeLand-Lake Helen Special Road, etc., Dist.*, 71 Fla. 158, 71 So. 42; *Edwards v. State*, 62 Fla. 40, 56 So. 401; *State v. Clearwater (Fla.)*, 139 So. 377; *Board of Com'rs v. Forbes Pioneer Boat Line*, 80 Fla. 252, 86 So. 199, reversed on other grounds in 258 U. S. 338, 42 S. Ct. 325, 66 L. Ed. 647.

Using this frequently stated and well established premise as a basis for an examination of the law of the State of Florida, and as enunciated by the State Courts, it appears:

(1) The Circuit Court of the State of Florida determined that the act authorizing the Hernando County Board of Public Instruction bonds was constitutional when it entered a judgment declaring the bonds valid.

(2) A Circuit Court in Bay County determined that bonds issued under a precisely similar statute were also constitutional when that Court validated similar bonds.

(3) The Supreme Court of the State of Florida, in the case of *Warren vs. Board of Public Instruction*, supra, which decision was, in effect, unreversed by any later decision at the time of the issuance of the bonds herein sued upon, held that the case was not repugnant to the Constitution of the State of Florida.

(4) The same Circuit Court which validated the bonds issued under a precisely similar statute by the Board of Public Instruction of Bay County, Florida, later declared them void and contrary to the Constitution of the State of Florida.

(5) On a writ of error to this judgment, the Supreme Court of the State of Florida, by an evenly divided opinion, was unable to declare that that act (precisely similar to the act at hand) was repugnant to the Constitution of the State of Florida.

(6) The Federal District Court subsequently held the Bay County, Florida, Board of Public Instruction bonds valid obligations of the District.

These decisions then were not so binding upon the Circuit Court of Appeals that it, in an independent determination by it of the constitutionality of the act authorizing the bonds so as to compel that Court, as the mouthpiece from which must emanate the Florida law, as determined by the Florida decisions, to declare the authorizing act void beyond any and all rational view taken of it. The Supreme Court of Florida could not make such a determination; the lower court in Bay County, in determining a similar act, determined the question both ways; the Supreme Court of the State of Florida in other cases on similar statutes have consistently held the obligations valid and binding.

That the Circuit Court of Appeals proceeded correctly can hardly be questioned!

IV.

The Rendition of the Judgment.

It should be observed that on July 26, 1940, without leave of court first obtained, after the decision of the Circuit Court of Appeals, holding the securities valid obligations against the Petitioner, 112 F. (2) 914, upon the mandate

coming down to the lower court, the Defendant filed "Additional defenses to the Complaint" (R. 9803, 11). The main defense relied on was that the Defendant denied the execution or delivery of the interest coupons sued upon and denied that the interest coupons were clipped from the bonds executed by the Defendant.

No demand for a jury trial was requested.

On August 14, 1940, (R. 9803, 13) request for admission under Rule 36 of the Federal Rules of Civil Procedure was served upon the Defendant requesting admission that the interest coupons exhibited to the Defendant were genuine; that each of the coupons was executed and delivered by the Defendant. To this request, the Defendant, purporting to comply with rule 36, filed a sworn answer, which is sworn to by the same individual, as Chairman of the Board, whose facsimile signature appears on the coupons. He swore that it was impossible for him to tell whether the coupons were genuine or not; that he could not admit whether the coupons were executed and delivered with the bonds because the coupons had been detached from the bonds.

Thereupon, affidavits were filed by the Plaintiffs showing that they were holders of the bonds; by another person showing that the coupons were actually phyically detached from the original bonds; and by a third person who had manually computed the interest on the coupons.

Thereupon, the Judge entered final judgment on the coupons. Petitioners apparently make no claim that the coupons were not valid, or that they were not actually issued by the taxing unit, or that the amount of the judgment was not cor-

rect, but their sole claim is that they had no chance to cross examine the witnesses who filed the affidavits.

The spirit of the Federal Rules of Civil Procedure was certainly borne out in this case. The Judge definitely ascertained that there was no material fact actually and in good faith contraverted by the Defendant; no real defenses had been interposed. It is not amiss to observe at this time that the very person who denied the execution of the bonds and who denied that the coupons were detached from the bonds is the same person whose facsimile signature appears on the coupons. The Defendant apparently makes no complaint about the correctness of the judgment; about the amount of the judgment; or about its liability on the instruments, the sole cry being that no opportunity was given them to cross examine the persons who filed the affidavits; no counter affidavits were filed; nor did the Defendant request a jury trial. When the Court determined that no material fact had actually and in good faith been contraverted, there was nothing for it to do but to enter summary judgment for the full amount of its claim. A similar interpretation of Rule 56 of the Civil Rules of Procedure was upheld in the following cases:

American Insurance Co. vs. Gentile Brothers Company, (CCA 5, 1940), 109 F. (2) 732, Cert. Den. 310 U. S. 633, 60 Sup. Ct. 1075, 84 L. Ed. 1403, Cf. *Port of Palm Beach District vs. Goethals*, (C. C. A. 5) 104 F. (2) 706. That Court, speaking through Judge McCord, said:

> "When the motion for summary judgment was heard, there was no genuine issue as to any material fact, and the Court properly entered judgment for the plaintiff."

There had been no demand for a jury trial, but assuming that there should have been a trial on the fictitious issues presented, it is clear that from the record existing at the time of the motion for summary judgment, the Court was clearly convinced that if the action were permitted to go to trial, the Court would have to render verdict and judgment for the Plaintiff. In such case, motion for summary judgment should be granted. *Mutual Life Insurance Co. of New York vs. Ballard*, 1 F. R. D. 180; *Whiteman vs. Federal Life Insurance Co.*, 1 F. R. D. 95.

CONCLUSION

In conclusion, it is respectfully submitted that the writ of certiorari should be denied in this cause because:

(1) The case of *State ex rel, Vickery vs. Mowat*, decided by an evenly divided Court, was not binding upon the Circuit Court of Appeals.

(2) The decision of the Circuit Court of Appeals holding the act authorizing the issuance of the bonds constitutional is clear in accordance with the great weight of authority in the State of Florida.

(3) The authorizing statute has not been shown to be so repugnant to the Constitution of the State of Florida that the Supreme Court of the United States should make an independent determination thereof.

(4) That the procedure following and entering the final judgment on affidavits was a correct procedure under the Federal Rules of Civil Procedure.

Respectfully submitted,

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APPENDIX "A"

CONSTITUTION OF FLORIDA

"Section 8. Each county shall be required to assess and collect annually for the support of the public free schools therein, a tax of not less than three (3) mills, nor more than ten (10) mills on the dollar on all taxable property in the same. (Amendment of 1904, Joint Resolution 2, Acts 1903, making the maximum seven (7) mills, as amended by Joint Resolution 25, Acts 1917, and adopted at general election, 1918)."

"Section 9. In addition to the tax provided for in Section 8 of this article the County School Fund shall consist of the proportion of the interest of the State School Fund and of the one mill State tax apportioned to the county, all capitation taxes collected within the county and all appropriations by the Legislature which shall with all other County School Funds be apportioned and distributed as may be provided by law and shall be disbursed by the County Board of Public Instruction solely for the support and maintenance of public free schools: Provided, that such apportionment and distribution shall be made by general law based upon some declared principle of classification to be determined by the Legislature. (Amended, House Joint Resolution 541, Acts 1925; adopted at general election, 1926)."

"Section 17. The Legislature may provide for special tax school districts to issue bonds for the exclusive use of public free schools within any such special tax school district, whenever a majority of the qualified electors thereof who are freeholders shall vote in favor of the

issuance of such bonds, but no bonds shall be issued hereunder which shall exceed, together with the existing indebtedness of such special tax school district, 20 per cent. of the assessed value of the taxable property of such district according to the last assessment for State and County purposes prior to the issuing of such bonds. * * * (Additional section, Joint Resolution 76, Acts 1911; adopted at general election, 1912. Amended, Senate Joint Resolution 333, Acts 1923; adopted at general election, 1924)."

APPENDIX "B"

CHAPTER 9464—(No. 346)

AN ACT to Authorize the Board of Public Instruction of Hillsborough County, Florida, to procure a Loan of not exceeding Two Hundred Thousand Dollars ($200,000.00) and pay interest thereon at at rate not exceeding seven per cent. (7%) per annum, for the purpose of *enlarging the high school building* belonging to the said Board, located in the City of Tampa, and wherein is maintained the county high school for said Hillsborough County, and for the purpose of furnishing such enlargement of said high school building; to authorize said Board in order to procure said loan, to issue and sell not exceeding Two Hundred Thousand ($200,000.00) in principal amount of interest bearing coupon warrants; to make provision for a sinking fund for the retirement of said warrants and the interest to become due thereon; to regulate the expenditure of the sum derived from the sale of said warrants; and to provide for the validation of said warrants.

APPENDIX "C"

CHAPTER 10,655—(No. 633).

AN ACT to Authorize the Board of Public Instruction of Hernando County, Florida, to Procure a Loan of not Exceeding Seventy-five Thousand Dollars ($75,000.-00) and Pay Interest Thereon at a Rate not Exceeding Six Per Cent. (6%) Per Annum, for the Purpose of Acquiring Land within said County and *Erecting Thereon and Furnishing a High School Building to belong to the said Board,* wherein to Maintain a County High School for said Hernando County; to Authorize said Board, in Order to Procure said Loan, to Issue and Sell not Exceeding Seventy-five Thousand Dollars ($75,000.00) in Principal Amount of Interest Bearing Coupon Bonds; to make Provision for a Sinking Fund for the Retirement of said Bonds and the Interest to Become Due Thereon and to Regulate the Expenditures of the Sum Derived from the sale of Said Bonds.

APPENDIX "D"

CHAPTER 10,366—(No. 344)

AN ACT to Authorize the Board of Public Instruction of Bay County, Florida, to Procure a Loan of not Exceeding One Hundred Thousand Dollars ($100,000.00), and to Pay Interest Thereon at a rate not Exceeding Six Per Cent. (6%) per Annum for the Purpose of *Erecting and Furnishing* a High School Building to Belong to the Said Board, Wherein to Maintain a County High School for Said Bay County; To Authorize Said Board, in order to Procure Said Loan, to Issue and Sell Not Exceeding One Hundred Thousand Dollars ($100,000.00) in Principal Amount of Interest Bearing Coupon Bonds; to Make Provision for a Sinking Fund for the Retirement of said Bonds and the Interest to Become Due Thereon, and to regulate the Expenditure of the Sum Derived from the Sale of Said Bonds.

APPENDIX "E"

IN THE SUPREME COURT OF FLORIDA
JUNE TERM, A. D. 1939

STATE OF FLORIDA, EX REL., L. E. VICKERY,

Appellant,

vs.

D. MOWAT, as Chairman of the Board of Public Instruction of Bay County, Florida, W. R. NICHOLS and D. D. JONES, as Members of said Board of Public Instruction,

Appellees.

BAY COUNTY

TERRELL, C. J.

The Appellant as Relator and holder of bond Number 20, issued by the Board of Public Instruction of Bay County pursuant to Chapter 10366, Acts of 1925, brought this proceeding in mandamus against the said Board of Public Instruction to require it to impose a tax on all the taxable property in Bay County sufficient to pay the principal and interest on said bond and others of the same issue. A motion to quash the alternative writ was granted, final decree was entered, and this writ of error was prosecuted.

In fine, Chapter 10366, authorizes the Board of Public Instruction of Bay County to issue bonds not to exceed $100,000 in amount for the purpose of erecting a central high

school building for the use of the County, the said bonds to run not exceeding thirty years and to be retired serially. A portion of the County school fund raised under Section Eight of Article Twelve of the Constitution of Florida, was appropriated under the act to pay interest on and retire said bonds.

The sole question raised in the Court below and brought here for determination is the power of the legislature to authorize the use of funds raised under Section Eight of Article Twelve of the Constitution to pay interest on and retire the bonds so issued.

It appears that the bonds brought in quesion were issued in June, 1925, and were validated by decree of the Circuit Court, that a County high school building was constructed with the proceeds of said bonds and has for years been in use by the County, that interest was paid on the bonds until 1931, when further payments were restrained by decree of the Circuit Court, that said restraining order was later dissolved but no further payments have been made on principal or interest of the bonds and so far as the record discloses; the school term has not been diminished.

It is contended by appellee that the judgment below should be affirmed because all school funds raised under Section Eight of Article Twelve must be used for the support and maintenance of the public schools of the county and that no part of it can be used for the construction of buildings. This contention is supported by the decisions of this Court. See State vs. Board of Public Instruction of Dade County, 126 Fla. 142, 170 So. 602, where this question is fully covered, and

we pointed out that the Constitution provided a complete scheme for the support of the public schools and for the *construction of school buildings.*

We do not in any sense depart from the law as stated in the last cited case. If the payment of interest and retirement of the bonds brought in question with the funds appropriated tended to disrupt the school term, we might be forced to hold them invalid. The record, however, makes no such showing and for all that may be gathered from it, quite the contrary is the case.

Chapter 10366 does not appropriate all the funds possible to be raised under Section Eight of Article Twelve to pay interest on and retire said bonds. It only appropriates a portion of these funds and it is not shown that the use of the funds appropriated for building purposes materially interfered with the support of the public schools of the County. In fact, it is shown that the schools were continued for six years and the bonds were serviced for a like period and the service on the bonds was cut off because of the injunction previously referred to.

While we do not approve this method of financing the construction of high school buildings, at the same time after bonds are issued and validated and have been in the hands of innocent purchasers for fourteen years and the county has had the use of the building for that time, we must decline to hold them invalid at the instance of the Board of Public Instruction when only a portion of the funds raised under Section Eight of Article Twelve are appropriated to service them and it is not shown that the support of the school was materially affected.

When the support of the public schools of the county is provided for, there can be no objection to using any remaining portion of the funds raised under Section Eight of Article Twelve to construct a countywide high school building. State vs. Board of Public Instruction, 86 Fla. 254, 97 So. 384. A board of public instruction should not be permitted under the guise of a constitutional guaranty to provide a facility like a high school building for the county and then turn around and use the same constitutional guaranty to defeat its obligation to pay for the facility so acquired and being used for public school purposes.

If this can be done, sanctity of contract becomes nothing more than a windy platitude. It extracts the moral element from the law, the property that saves it from becoming effete and putrid. Bereft of its moral philosophy, the fundamental and statutory law of a democracy becomes as bread without salt, as a woman without charm, or a man without honor. The spirit of it has departed and nothing remains but dry bones too inert to rattle.

Having reached this conclusion, it follows that the judgment below must be and is hereby reversed.

Reversed.

WHITFIELD, P. J., AND CHAPMAN, J. J., concur.

BROWN, BUFORD AND THOMAS, J. J., dissent.

APPENDIX "F"

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1940

EN BANC

STATE OF FLORIDA, EX REL., L. E. VICKERY, *Appellant,* vs. D. MOWAT, as Chairman of the Board of Public Instruction of Bay County, Florida, W. R. NICHOLS and D. D. JONES, as Members of said Board of Public Instruction, *Appellees.*	BAY COUNTY

Opinion filed February 9, 1940

An Appeal from the Circuit Court for Bay County, Ira A. Hutchison, Judge, J. M. & H. P. Sapp, for Appellant; Stokes & Douglas and Mabry, Reaves, Carlton & White, for Appellees.

PER CURIAM.

In this cause Mr. Chief Justice TERRELL, Mr. Justice WHITFORD and Mr. Justice CHAPMAN are of the opinion that the decree in this cause should be reversed while Mr. Justice BROWN, Mr. Justice BUFORD and Mr. Justice

THOMAS are of the opinion that the said decree should be affirmed. When the members of the Supreme Court sitting six members in a body and after full consultation, it appears that the members of the Court are permanently and equally divided in opinion as to whether the decree should be affirmed or reversed, and there is no prospect of an immediate change in the personnel of the Court, the decree should be affirmed; therefore it is considered, ordered and decreed under the authority of State ex rel Hampton vs. McClung, 47 Fla. 224, 37 So. R. 51, that the decree of the Circuit Court in this cause be and the same is hereby affirmed.

Affirmed.

TERRELL, C. J., WHITFIELD, BROWN, BUFORD, CHAPMAN AND THOMAS, J. J., concur.

I, GUYTE P. McCORD, Clerk of the Supreme Court of Florida, do hereby certify that the above and foregoing is a true and correct copy of the Alternative Writ of Mandamus including copy of the Bond and Coupon involved and attached as Exhibits thereto; copy of the Order of the Court Below upon the Motion to Quash filed by Respondents; copy of Opinion written by Chief Justice Terrell and copy of Order of Court Affirming the Circuit Court in and for Bay County, Florida in that certain cause recently pending in this Court wherein the State of Florida ex rel L. E. Vickery was Appellant and D. Mowat, as Chairman of the Board of Public Instruction of Bay County, Florida, W. R. Nichols and D. D.

Jones, as Members of said Board of Public Instruction were Appellees as the same appears among the Records and Files in my said Office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court at Tallahassee, Florida, this 20th day of May, A. D. 1940.

GUYTE P. MCCORD,
Clerk Supreme Court of
Florida.

(SUPREME COURT SEAL)

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